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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

SURE-TAN, INC. and SURAK LEATHER COMPANY,
Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT**

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QUESTIONS PRESENTED

1. Can the National Labor Relations Board order backpay for illegal aliens, thereby creating a fundamental conflict between the National Labor Relations Act and the Immigration and Nationality Act?
2. Is the imposition of an arbitrary six-month backpay liability on an employer an improper punitive remedy?
3. Does an employer "constructively discharge" its employees by requesting an investigation of their immigration status?
4. Does the National Labor Relations Act require an offer of reinstatement to be held open for four years, to be delivered in a manner allowing verification of receipt, and to be written in Spanish?

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NATIONAL LABOR RELATIONS BOARD,
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**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
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Sure-Tan, Inc. and Surak Leather Company¹ petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit entered on July 12, 1982.

OPINIONS BELOW

The Order and Judgment of the United States Court of Appeals for the Seventh Circuit, entered on July 12, 1982, has not been officially reported (25a; 30a)².

¹ The National Labor Relations Board found that both firms constituted a single, integrated employer. *Sure-Tan, Inc.*, 234 N.L.R.B. 1187, 1189 (1978).

² References herein to "a" pages are to pages in the Appendix to this petition.

The decision of the United States Court of Appeals for the Seventh Circuit denying a Petition for Rehearing and Suggestion for Rehearing *En Banc*, entered May 5, 1982, is reported at 677 F.2d 584 (36a).

The opinion of the United States Court of Appeals for the Seventh Circuit, entered on February 24, 1982, as amended on February 26, 1982, is reported at 672 F.2d 592 (1a).

The Decision and Order of the National Labor Relations Board, entered March 6, 1978, is reported at 234 N.L.R.B. 1187 (61a).

JURISDICTION

The judgment of the court of appeals was entered on July 12, 1982 (25a, 30a). Petitioners filed a Petition for Rehearing and Suggestion for Rehearing *En Banc* on March 10, 1982. The court of appeals' order denying the Petition for Rehearing and Suggestion for Rehearing *En Banc* was entered on May 5, 1982 (36a).

On September 15, 1982, Sure-Tan, Inc. and Surak Leather Co. filed an Application for Extension of Time in Which to File Petition for Writ of Certiorari. An order extending time in which to file a petition for Writ of Certiorari was entered by this Court on September 17, 1982, extending the time for Sure-Tan, Inc. and Surak Leather Co. to file a Petition for Writ of Certiorari to and including December 6, 1982.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES, RULES AND REGULATIONS INVOLVED

National Labor Relations Act

Section 7 of the National Labor Relations Act of 1947, 29 U.S.C. § 157, provides, in pertinent part, as follows:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection

Section 8(a)(1) and (3) of the National Labor Relations Act of 1947, 29 U.S.C. § 158(a)(1) and (3), provides, in pertinent part, as follows:

(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of rights guaranteed in section 7;

. . . .

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization

Section 10(c) of the National Labor Relations Act of 1947, 29 U.S.C. § 160(c), provides, in pertinent part, as follows:

If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served upon such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without backpay, as will effectuate the policies of this [Act]. . . . No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause.

Immigration and Nationality Act

Section 212(a)(14) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(14), provides, in pertinent part, as follows:

(a) Except as otherwise provided in this chapter, the following classes of aliens shall be ineligible to receive visa and shall be excluded from admission to the United States:

....

(14) Aliens seeking to enter the United States, for the purpose of performing skilled or unskilled labor, unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that (A) there are not sufficient workers in the United States who are able, willing, qualified . . . , and available at the time of application for a visa and admission to the United States and at the place to which the alien is destined to perform such skilled or unskilled labor, and (B) the employment of such aliens will not adversely affect the wages and working conditions of the workers in the United States similarly employed.

Section 241 of the Immigration and Nationality Act, 8 U.S.C. § 1251, provides, in pertinent part, that:

(a) Any alien in the United States (including an alien crewmen) shall, upon order of the Attorney General, be deported who—

(1) at the time of entry was within one or more of the classes of aliens excludable by the law existing at the time of such entry

Section 287 of the Immigration and Nationality Act, 8 U.S.C. § 1357, provides, in pertinent part, that:

(a) Any officer or employee of the Service authorized under regulations prescribed by the Attorney General shall have power without warrant—

(1) to interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States

National Labor Relations Board Casehandling Manual

Section 10528.15 of the National Labor Relations Board Casehandling Manual (Part III) provides as follows:

To avoid misunderstanding, the Compliance Officer should advise employers to make offers of reinstatement in writing and should likewise advise discriminatees to respond thereto in writing.

STATEMENT OF THE CASE

Respondents Sure-Tan, Inc. and Surak Leather Company ("Sure-Tan") are two small leather processing and sales firms located in Chicago, Illinois. Sure-Tan employed approximately 11 workers in 1976. A number of these employees were Spanish speaking (3a).

In August, 1976, the Chicago Leather Workers Union, Local 431, Amalgamated Meatcutters and Butcher Workmen of North America (the "union") filed an election petition with the National Labor Relations Board (the "Board"), and an election was held on December 10, 1976. The union won the election (2a).

After the election, John Surak, one of the owners of Sure-Tan, inquired with the Immigration and Naturalization Service ("INS") as to the immigration status of certain of its employees. By letter dated January 20, 1977 to the INS, Surak stated as follows:

We would like you to check the emigration [sic] status of several [of] our employees, who are Mexican nationals:

Floriverito Rodriguez, also known as Manuel Vega, Social Security Number 322-52-1459

Juan P. Florez, also known as Jose Martinez, Social Security Number 338-50-1497

Jesus Patina, Social Security Number 327-58-7445, also known as Manuel Rosiles, Social Security Number 357-56-3731 also known as Hector Maldonado

Francisco Robles, Social Security Number 466-11-2550

Ernesto Arreguin, Social Security Number 357-48-2329

Sacramento Serrano, Social Security Number 236-47-5634

Primitino Cervantez, Social Security Number 338-62-3142

Arguimiro Ruiz, Social Security Number 548-06-8995

We appreciate your attention to this request as soon as possible.

Yours very truly,

Sure-Tan, Inc.

V. J. Surak

In response to this letter, the INS checked its files to see if the individuals named were lawful permanent residents of the United States. Thereafter, on February 18, 1977, INS agents visited Sure-Tan and discovered that five of the eight employees listed in Surak's letter (Flores, Robles, Arreguin, Serrano and Ruiz) were residing illegally in the United States. These illegal aliens were arrested by INS agents. Each illegal alien was permitted by the INS to execute INS form I-274, whereby he acknowledged that he was a Mexican citizen illegally present in the United States. The illegal aliens were then placed aboard a bus that transported them back to the Mexican border (9a-10a).

The Board's General Counsel issued complaints against Sure-Tan on February 22, 1977 and March 23, 1977, alleging, *inter alia*, that Sure-Tan discriminatorily discharged the five illegal alien employees (66a). On March 29, 1977, Sure-Tan mailed letters offering reinstatement to the five illegal aliens (20a). Each letter stated as follows:

Sure-Tan, Inc. offers you full and complete reinstatement of your former job, provided only that your reemployment shall not subject Sure-Tan, Inc. to any violations of the United States immigration laws.

Please report to work no later than May 1, 1977, if you accept this offer of reemployment.

The Administrative Law Judge concluded that Sure-Tan constructively discharged these five illegal aliens, in violation of Sections 8(a)(1) and (3) of National Labor Relations Act (the "Act") by requesting INS to investigate their immigration status (77a). The ALJ's recommended order called for Sure-Tan to offer reinstatement to the employees, with the offer to remain open for six months. The ALJ reasoned that, since the alleged discriminatees were not available for employment after their return to Mexico, there should be no backpay award (80a-81a).

A three member panel of the Board (Fannings, Jenkins, and Penello), in its decision and order of March 6, 1978, adopted the conclusions of the ALJ, but modified the remedy, ordering that the illegal aliens be offered unconditional reinstatement, with backpay (63a-64a).

The Board's General Counsel, on September 7, 1978, filed a "Motion For Clarification," requesting that the Board "make plain" what the Company's obligations were under the Board's order (53a). The General Counsel observed that the order "appears to require reinstatement and backpay without regard to the discriminatee's illegal alien status" (55a). Such result, the General Counsel noted, would be "contrary to the national immigration policies and laws," because it would encourage the alleged discriminatees to reenter the country illegally (56a).

A majority of the Board (members Fanning, Jenkins and Truesdale) issued an order on December 5, 1979 denying the General Counsel's Motion for Clarification, and reaffirming the

Board's earlier order (44a). Members Penello and Murphy dissented. Member Penello noted that:

The majority's refusal to consider how the enforcement of the National Labor Relations Act (NLRA) may be effectuated in such a way as to fit in with the implementation of the current goals of immigration policies manifests an overwhelming indifference and insensitivity to other Federal law, either alone or as it may impact on the current labor and economic situation in this country.

Member Penello would have granted the Motion for Clarification, and limited to the order "so as to require [Sure-Tan] to offer reinstatement only to discriminatees lawfully in the country" (45a). Member Murphy would have limited the back pay period "to a time from the date of discharge to the date of deportation," and would have also limited the time for acceptance of the Company's reinstatement offer to two weeks (50a-51a).

The court of appeals, in its decision of February 24, 1982, enforced the Board's order, subject to the following modifications: (1) reinstatement would be required only if the alleged discriminatees were lawfully entitled to be present and employed in this country when they offer themselves for reinstatement (22a); (2) the reinstatement offer would remain open for a period of four years (22a); (3) in computing back pay, the discriminatees would be deemed unavailable for work during any period when they were not lawfully entitled to be present and employed in the United States (23a); (4) backpay would be placed in escrow for a period of one year (23a); and (5) the Board, "if it sees fit," could modify its order further by setting a minimum period of six months for which backpay would be awarded, regardless of the lawful availability of the discriminatees for work during the backpay period (23a-24a).

Finally, the court of appeals held that Sure-Tan's prior offer of reinstatement to the alleged discriminatees was defective because it did not hold the offers open for a period of four years, was not delivered in a manner allowing verification of receipt, and was not written in Spanish (22a).

In its judgment and order of July 12, 1982, the court of appeals eliminated the discretion it had previously given the Board to modify its order with respect to backpay, and required that each discriminatee be awarded a minimum of six months' backpay (28a).

REASONS FOR GRANTING THE WRIT

The court of appeals' judgment and order, which would award illegal aliens six-months' pay, creates a fundamental conflict between the National Labor Relations Act, as it is interpreted by the court, and the Immigration and Nationality Act. The clear purpose of the INA is to protect American workers from an influx of foreign labor. The court of appeals, however, would treat the illegal aliens as though they had a right to remain illegally in the United States for an additional six months after their detection by the INS. This single-minded application of Federal labor laws for the purpose of punishing an employer manifests an overwhelming disregard for Federal immigration policies.

The Board and the court of appeals also misapply the "constructive discharge" doctrine, by holding Sure-Tan liable for actions undertaken by the Immigration and Naturalization Service in accordance with Federal immigration laws. In effect, the court of appeals seeks to impose a six-month backpay penalty on Sure-Tan for asking the INS to investigate the immigration status of the employees. Such punitive Board orders are not permitted under Section 10(c) of the Act.

I. THE SIX-MONTH BACKPAY AWARD SUBVERTS FEDERAL IMMIGRATION OBJECTIVES.

The court of appeals ordered that a minimum of six months' backpay be awarded to the illegal aliens because such a period of time would be "the minimum during which the discriminatees may reasonably have remained employed without apprehension by the INS, but for the employer's unfair labor practice" (23a; 28a-29a; 32a). Thus, the court treats the illegal aliens as though they had a right to remain in this country for an additional six months, when in fact they had no legal right to reside in the United States in the first place. By rewarding illegal aliens for their illegal presence in the United States, the court flouts the objectives of the Immigration and Nationality Act.³

Furthermore, the court of appeals' backpay award provides the illegal aliens with a significant incentive to reenter this country illegally. The court of appeals in fact acknowledged that: "It obviously remains a possibility . . . that the discriminatees in this case might be motivated to reenter the United States unlawfully to claim reinstatement and backpay." (18a). The court sidesteps this danger by surmising that a discriminatee would be unlikely to attempt to illegally enter the United States to pursue his remedies, and thereby "draw attention to his illegal alien status." (18a). The court further opines that: "Indeed, the economic and social attractions which

³ Section 212(a)(14) of the INA, 8 U.S.C. § 1182(a)(14) provides that a foreign national is excludable from the United States:

[U]nless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that (A) there are not sufficient workers in the United States who are able, willing, qualified . . . and available at the time of application for a visa and admission to the United States and at the place to which the alien is destined to perform such skilled or unskilled labor, and (B) the employment of such aliens will not adversely affect the wages and working conditions of the workers in the United States similarly employed.

generally encourage illegal migration to this country are probably more compelling inducements than the special fruit of the Board's order might be in this case." (18a).

It is difficult to conceive, however, of a more "compelling inducement" to reenter this country illegally than the windfall backpay award ordered by the court. Such an inducement to illegally reenter this country would clearly subvert Federal immigration objectives.⁴ The clear objective of Congress under the INA is to protect American workers from an influx of foreign labor. The objectives of the INA have been articulated in a number of court opinions. In *Pesikoff v. Secretary of Labor*, 501 F.2d 757, 761 (D.C. Cir.), *cert. denied*, 419 U.S. 1038 (1974), the District of Columbia Circuit observed that Section 212(a)(14) of the INA is written "so as to set up a presumption that aliens should not be permitted to enter the

⁴ The Board's own General Counsel, in his Motion for Clarification, expressly recognized the inappropriateness of the Board's traditional remedy of reinstatement and backpay in this case, stating:

If the Board order is construed to require reinstatement and backpay without regard to status, it would surely encourage a discriminatee to return to the United States, since there would be a Board-ordered job for him here. Similarly, if mere physical presence in this country is sufficient to trigger the running of backpay, . . . a discriminatee would be encouraged to return to the United States illegally, so that he could reap these jobs in monetary benefits as soon as possible, rather than postpone them perhaps give up these benefits entirely by delaying his return until the uncertain day, far in the future, when he *may* be able to enter the United States lawfully.

(55a).

Although the court of appeals modified the Board order to eliminate the possibility of reinstatement of an employee who is not legally residing in this country, it *increased* the incentive for the employee to return illegally to collect backpay.

United States for the purpose of performing labor because of the likely harmful impact of their admission on American workers.”⁵

This Court has recognized that the Board is obligated to formulate remedies that comport with Congressional objectives under other statutory schemes. In *Southern Steamship Co. v. NLRB*, 316 U.S. 31, 47 (1942), this Court faulted the Board for ordering reinstatement and backpay to striking seamen, where the order ran contrary to the federal anti-mutiny statute, stating that:

[T]he Board has not been commissioned to effectuate the policies of the Labor Relations Act so single-mindedly that it may wholly ignore other and equally important Congressional objectives. Frequently, the entire scope of Congressional purpose calls for careful accommodation of one statutory scheme to another, and it is not too much to demand of an administrative body that it undertake this accommodation without excessive emphasis upon its immediate task.⁶

⁵ *Accord Wang v. Immigration and Nationality Service*, 602 F.2d 211, 213 (9th Cir. 1979) (per curiam); *Stenographic Machines, Inc. v. Regional Administrator for Employment and Training*, 577 F.2d 521, 529 (7th Cir. 1978); *Williams v. Usery*, 531 F.2d 305, 307 (5th Cir.), cert. denied, 429 U.S. 1000 (1976); *Silva v. Secretary of Labor*, 518 F.2d 301, 310 (1st Cir. 1975).

⁶ The court of appeals maintains that its remedy does not run contrary to *Southern Steamship Co.* because the order does not “necessarily” encourage illegal immigration (18a n.17). However, as discussed *supra* at pp. 10-11, the backpay award wrongly presumes that the illegal aliens had a right to remain in the United States for six additional months, and provides the illegal aliens with a strong incentive to return illegally to this country.

Similarly, in the present case, it is not too much to demand of the Board and the court of appeals that they formulate remedies that comport with the objectives of the INA.⁷ As noted by Judge Wood in his dissent to the court's order denying Sure-Tan's Petition for Rehearing: "The NLRB seems to use only its private knothole to view these issues and sees nothing except its own labor goals. I think this court instead of peering through the NLRB's knothole should look over the fence for a better understanding of the whole problem." (38a).

Unless this Court helps the court of appeals and the Board "look over the fence" by granting certiorari to review the court's backpay remedy, the court and the Board will continue to peer through the Board's "private knothole" and subvert Federal immigration objectives.

II. THE AWARD OF SIX-MONTHS' BACKPAY TO THE ILLEGAL ALIENS CONSTITUTES AN IMPROPER PUNITIVE REMEDY VIOLATIVE OF SECTION 10(c) OF THE ACT.

The court acknowledged that the six month period for computing backpay was "obviously conjectural." (23a). In addition to being conjectural, the award is blatantly punitive, having the same purpose and effect as a criminal fine. The

⁷ Members Penello and Murphy, in their dissenting opinions to the Board's order denying the General Counsel's Motion for Clarification, criticized the majority for its utter indifference to national immigration policy (45a; 50a). Member Murphy observed that:

The majority's refusal to consider how the enforcement of the National Labor Relations Act (NLRA) may be effectuated in such a way as to fit in with the implementation of the current goals of immigration policies manifests an overwhelming indifference and insensitivity to other Federal law, either alone or as it may impact on the current labor and economic situation in this country. However, nothing in the NLRA or its policies gives the Board a special dispensation to ignore other legislation.

court of appeals, in fact, recognized that the illegal aliens should be deemed unavailable for work and ineligible for back pay "during any period when not lawfully entitled to be present and employed in the United States." (23a). Yet, the court orders a minimum payment of six-months' backpay, contrary to its own procedure for computing backpay, to assure that all the illegal aliens get at least some monetary award. This imposition of an arbitrary backpay liability has no purpose other than to punish Sure-Tan for asking the INS to determine the immigration status of its Spanish-speaking employees.

Section 10(c) of the Act⁸ authorizes the Board, when it has found the employer guilty of an unfair labor practice, to require him to desist from such practices "and to take such affirmative action, including reinstatement of employees with or without backpay, *as will effectuate the policies of this [Act]*" 29 U.S.C. § 160(c) (emphasis added). This Court has repeatedly held, however, that the Board's authority under Section 10(c) is remedial, not punitive.

In the case of *Republic Steel Corp. v. NLRB*, 311 U.S. 7, 11-12 (1940), this Court denied enforcement of part of a Board order which required an employer to reimburse governmental agencies for wages paid under a work relief program to employees who had been discriminatorily discharged by Republic Steel. This Court held that the Board did not have any authority under Section 10(c) of the Act to order an employer to make such payments to governmental agencies, stating:

We do not think that Congress intended to vest in the Board a virtually unlimited discretion to devise punitive measures, and thus to prescribe penalties or fines which the Board may think would effectuate the policies of the Act. We have said that "this authority to order affirmative action does not go so far as to confer a punitive jurisdiction

⁸ 29 U.S.C. § 160(c).

enabling the Board to inflict upon the employer any penalty it may choose because he is engaged in unfair labor practices even though the Board may be of the opinion that the policies of the Act may be effectuated by such an order." We have said that the power to command affirmative action is remedial, not punitive.

Id. (citations omitted).

The prohibition against punitive orders under Section 10(c) of the Act applies equally to the court of appeals. The court's arbitrary six-month backpay award is wholly impermissible.⁹ As noted by Judge Woods: "Much of the rationale for [the court's reinstatement and backpay remedy] seems to be to punish the employer. Punishment of employers of illegal aliens, however, is for Congress, not for us." (38a).

The court of appeals' assessment of a six-month backpay penalty in this case, in derogation of Section 10(c) of the Act, represents a legislative act that not even rampant judicial activism should entertain. This Court should grant certiorari to check the court of appeals' improper infringement of powers which should be reserved for Congress.

⁹ In *Kroger Company v. N.L.R.B.*, 401 F.2d 682, 688-89 (6th Cir. 1968), *cert. denied*, 395 U.S. 904 (1969), the Sixth Circuit denied enforcement to part of a Board order requiring the employer to make contributions to a voluntary profit sharing plan, where there was no basis for determining what an employee's contribution to the plan would have been in the absence of the employer's unfair labor practice. The court stated:

We do not consider that a punitive order denominated as a remedy is called for, nor should the Kroger employees be provided a "windfall" that could accrue from a working out of the complications inherent in obedience to . . . the Board's order. . . . Any effort to make such a determination [of the amount employees would have contributed to the voluntary profit sharing plan] would be pure speculation.

Similarly, in the present case, any determination of how long the illegal aliens would have remained working absent Sure-Tan's inquiry to the INS would be pure speculation, and an arbitrary award of backpay would represent a windfall to the illegal aliens.

III. SURE-TAN DID NOT CONSTRUCTIVELY DISCHARGE EMPLOYEES WHO WERE ILLEGAL ALIENS WHEN IT ASKED THE IMMIGRATION AND NATURALIZATION SERVICE TO INVESTIGATE THEIR IMMIGRATION STATUS.

The court of appeals concluded that Sure-Tan's inquiry to the INS relative to the legal status of its Spanish-speaking employees was motivated by anti-union animus, and "was the proximate cause of their departure." (12a). The court therefore held that Sure-Tan constructively discharged the illegal aliens in violation of Sections 8(a)(1) and (3) of the Act when it asked INS to investigate their immigration status (15a).¹⁰

Contrary to the court of appeals' conclusion, however, the return of the illegal aliens to Mexico was "proximately caused" by their own illegal status. Sure-Tan's inquiry to the INS facilitated the Service's performance of its statutory obligations; it in no way mandated the actions of the INS. The INS has a legal duty to uphold the Federal immigration laws—a duty that is not legally conditioned upon or modified by the actions of Sure-Tan.¹¹ It would be indeed anomalous and fundamentally

¹⁰ Adopting the rationale of the Fifth Circuit in *NLRB v. Haberman Construction Co.*, 641 F.2d 351, 358 (5th Cir. 1981) (en banc), the court of appeals reasoned that:

[T]wo elements are required to establish a constructive discharge. "First, the employer's conduct must have created working conditions so intolerable that an employee is forced to resign. Second, the employer must have acted 'to encourage or discourage membership in any labor organization' within the meaning of Section 8(a)(3) of the Act."

The first element is clearly absent in this case, because the employees' illegal presence in this country, not the actions of Sure-Tan, mandated their deportation.

¹¹ The duties of an INS officer include the interrogation of any alien or person believed to be an alien as to his right to remain in the United States. 8 U.S.C. § 1357. The immigration laws further call for deportation of any alien who, at the time of entry into the United States, was within one of the classes of excludable aliens (8 U.S.C. § 1251(a)(1)), including aliens who, like the alleged discriminatees in the present case, entered the United States unlawfully for the purpose of performing skilled or unskilled labor. 8 U.S.C. § 1182(a)(14).

unfair to hold Sure-Tan responsible for the actions of the INS, where those actions were mandated by Federal immigration laws.¹²

The court of appeals noted that it is of "considerable significance" that the alleged discriminatees were not deported by the INS, but rather "voluntarily departed" from this country after executing an INS form I-274 (9a, n. 11; 17a). Under this analysis, the court of appeals would hold Sure-Tan responsible for actions *voluntarily* undertaken by the illegal aliens. As noted by Judge Wood:

If we [had analyzed the case properly] I do not believe that the employers' notification to the Immigration and Naturalization Service would be construed as a "constructive discharge" so as to reward the illegal aliens for their illegal labor activities with possible reinstatement and backpay. . . .

Rather than approve the majority's concocted remedy, I would, even if it took some stretching of the doctrine, simply consider the case moot when the illegal aliens "voluntarily" returned to their country. . . . As it is, this court has given proxies to illegal aliens to cast votes for American workers and now has given the illegal aliens some encouragement to come back, displace our own workers and be awarded a backpay bonus for doing it. At least the view of the majority may serve to inspire Congress to rescue us from this state of things which is our own judicial doing (38a).

Sure-Tan, however, should not have to await uncertain Congressional action to rescue it from this improper imposition of liability for actions of the INS. This Court should act promptly, by granting certiorari in this case, to review and redress the court of appeals' misapplication of the constructive discharge doctrine.

¹² Indeed, as noted by the Ninth Circuit in *NLRB v. Apollo Tire Co.*, 604 F.2d 1180, 1183 (9th Cir. 1979): "An employer who suspects that an employee is in the United States without proper authority should report this information to the INS."

IV. THE NATIONAL LABOR RELATIONS ACT DOES NOT REQUIRE SURE-TAN'S REINSTATEMENT OFFER TO BE LEFT OPEN FOR FOUR YEARS, TO BE WRITTEN IN SPANISH, AND TO BE SENT IN A MANNER ALLOWING VERIFICATION OF RECEIPT.

The court's requirement that Sure-Tan leave its offers of reinstatement open for a period of four years represents a radical departure from normal Board procedures and places an undue burden on Sure-Tan, as well as Sure-Tan's present employees. The requirement that Sure-Tan translate its reinstatement offers into Spanish and send them in a manner allowing verification of receipt was also improper. None of these measures are required under the Board's normal practices. The Company should not be held, after the fact, to such stringent standards that have not been applied to other employers.

A. Four Year Reinstatement Period.

The Company's reinstatement offers were mailed to the alleged discriminatees on March 29, 1977 and remained open until May 1, 1977. This thirty day reinstatement period far exceeded the period required by the Board in other cases. In *American Enterprises, Inc.*, 200 N.L.R.B. 114 (1972), the Board approved a reinstatement offer that remained open for a period of six days. In *Woodland Supermarket*, 240 N.L.R.B. 295 (1979), the Board held that eight days was a reasonable period to hold open reinstatement offers.¹³

The Board's rejection of Sure-Tan's 30 day reinstatement offer and insistence on a six-month period was wholly unjustified. The court of appeal's four year reinstatement period is

¹³ See also *NLRB v. W.C. McQuaid, Inc.*, 552 F.2d 519 (3rd Cir. 1977), wherein the Third Circuit held that less than two weeks was a reasonable period to hold open reinstatement offers.

wholly unreasonable. Indeed, a four year reinstatement period is patently punitive, because it bears no reasonable relationship to the time required for the employees to respond to the Company's reinstatement offer.

As observed by the District of Columbia Circuit in *White Sulphur Springs Co. v. NLRB*, 316 F.2d 410, 415 (D.C. Cir. 1963), approving a reinstatement offer that remained open for only three days, "the employer was certainly entitled to know where it stood" Similarly, in the recent case, *Sure-Tan* was entitled to know where it stood with respect to reinstatement of the illegal aliens. The six month reinstatement period ordered by the Board and the four year period ordered by the Seventh Circuit would place *Sure-Tan* and the employees who replaced the illegal aliens in a state of limbo for an unreasonable period of time.

B. The Requirement That the Offers Be Written In Spanish and Be Sent By Means Allowing Verification of Receipt.

The Board's Casehandling Manual (Part III), § 10528.15, provides that: "To avoid misunderstanding, the Compliance Officer should advise employers to make offers of reinstatement in writing and should otherwise advise the discriminatees to respond thereto in writing." Nowhere in the Board's Casehandling Manual does the Board require that written reinstatement offers be sent in an employee's native language or in a manner allowing verification of receipt.

In holding that *Sure-Tan's* reinstatement offers were defective because they were written in English rather than in Spanish, the Board and the court of appeals required the company to incur the cost of hiring an interpreter to communicate with its employees. Such an extraordinary requirement is, in effect, an impermissible punitive remedy.

It is fundamentally unfair to require Sure-Tan, after the fact, to write the offers in Spanish, and mail them by registered or certified mail, where such measures are not required under the Board's own procedures. This Court has recognized that, "[w]hen the Board so exercises the discretion given to it by Congress, it must 'disclose the basis of its order' and give clear indication that it has exercised the discretion with which Congress has empowered it." *NLRB v. Metropolitan Life Insurance Co.*, 380 U.S. 438, 443 (1965). Where the Board has reached different conclusions in prior cases, it is essential that the "reasons for decisions in and distinctions among these cases" be set forth to dispel any appearance of arbitrariness. *Id.* at 442.

In the present case, Sure-Tan's reinstatement offers fully complied with the standards set forth in the Board's Casehandling Manual and in prior cases. Neither the Board nor the court of appeals offered any reasonable basis for requiring these offers to be left over for four years, to be written in Spanish, and to be sent in a manner allowing verification of receipt. This Court should grant certiorari to prevent the Board and the court of appeals from arbitrarily imposing these extraordinary requirements on Sure-Tan.

V. CONCLUSION

The court of appeals' order places the National Labor Relations Act in direct conflict with the Immigration and Nationality Act. The court's presumption that the illegal aliens would have remained in this country for another six months but for Sure-Tan's inquiry to the INS, and its award of six months' pay to the illegal aliens, reflects a brazen indifference to Federal immigration objectives. In effect, the court of appeals would grant the Board a license to ignore and subvert the INA in order to punish employers. This single-minded application of the National Labor Relations Act, in derogation of the policies and purposes of the Immigration and Nationality Act, contravenes this Court's mandate in *Southern Steamship* that the Board tailor its remedies to accommodate other Federal statutes.

The imposition of an arbitrary six-month backpay liability is also blatantly punitive. Further, the requirement that the reinstatement offers be left open for four years, be written in Spanish, and be sent in a manner allowing verification of receipt is an unjustified departure from Board precedent.

This Court should grant certiorari in this case to prevent the Board and the court of appeals from subverting Federal immigration policies and from imposing arbitrary and punitive remedies on employers.

Respectfully submitted,

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APPENDIX

In the

United States Court of Appeals

For the Seventh Circuit

No. 80-2448

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

SURE-TAN, INC., and SURAK LEATHER CO.,

Respondent.

On Application For Enforcement Of An
Order Of The National Labor Relations Board

ARGUED SEPTEMBER 30, 1981—DECIDED FEBRUARY 24, 1982
AS AMENDED FEBRUARY 26, 1982

Before CUDAHY, *Circuit Judge*, FAIRCHILD, *Senior Circuit Judge*, and BROWN, *Senior District Judge*.*

CUDAHY, *Circuit Judge*. When these same respondents were before us several years ago, we noted in passing certain "bogeymen" who now have made a full appearance calling on us for decision in this matter of first impression. See *NLRB v. Sure-Tan, Inc.*, 583 F.2d 355, 358 n.3 (7th Cir. 1978). In this prior decision involving the same respondent, we held that illegal aliens are "employees" protected by the National Labor Relations Act (the "Act" or "NLRA"). We presently confront the further knotty problem of rectifying the injustice done certain of these aliens, whose labor was gratefully accepted and broadly utilized but whose efforts at labor organization were rebuffed by expulsion from the United States.

* The Honorable Wesley E. Brown, Senior District Judge for the District of Kansas, is sitting by designation.

Unfortunately, more than five years have passed since the occurrence of the discriminatory acts underlying the order of the National Labor Relations Board (the "Board") in this case. Even more unfortunately, whatever remedy is approved here may have little effect in discouraging employer conduct which violates the rights of employees under the NLRA—conduct which the employer now argues was merely consistent with his duty under the Immigration and Naturalization Act (the "INA").

Respondent Sure-Tan, Inc., and Surak Leather Company ("Sure-Tan") are two small leather processing and sales firms located in Chicago, Illinois.¹ Both firms are owned and operated by Steve and John Surak, and at the times relevant to this case they employed approximately eleven workers. Most of these employees were Mexican nationals in the United States without visas or work permits. A union organization drive began at Sure-Tan in July, 1976, and eight employees signed cards authorizing the Chicago Leather Workers Union, Local 431, Amalgamated Meatcutters and Butcher Workmen of North America (the "Union"),² to act as their collective bargaining representative. On August 12, 1976, the Union filed an election petition with the Board and an election was held on December 10, 1976. The Union won the election, and on January 19, 1977, the Board notified Sure-Tan that its objections were overruled and that the Union was certified as the employees' collective bargaining representative.

On February 22 and March 23, 1977, the Board's Acting Regional Director for Region 13 issued complaints against Sure-Tan, charging that Sure-Tan violated sections 8(a)(1), 8(a)(3) and 8(a)(4) of the Act by dis-

¹ The Board found that both firms constituted a single, integrated employer and respondents have not challenged this finding on appeal. *Sure-Tan, Inc.*, 234 N.L.R.B. 1181, 1189 (1978); see *NLRB v. Sure-Tan, Inc.*, 583 F.2d 355, 358 (7th Cir. 1978).

² The Union is currently affiliated with the United Food and Commercial Workers International Union, AFL-CIO.

criminatorily discharging five employees because of their union activities; threatening, interrogating and coercing its employees to discourage them from engaging in protected activities; and discriminatorily reprimanding an employee who filed a complaint with the Board. The case was heard by an administrative law judge (ALJ) who upheld the complaints in all respects. The Board affirmed and adopted the ALJ's findings and conclusions but modified the backpay and reinstatement remedy proposed by the ALJ. We shall discuss separately each issue raised by Sure-Tan with respect both to the merits of the Board's order and the Board's revised reinstatement and backpay remedy. In summary, we find that substantial evidence supports the Board's order in this case, subject to certain modifications of the remedy.

I. Interrogations and Threats

The ALJ found that on several occasions between August, 1976 (after the Union began its organization efforts), and December, 1976, John Surak threatened, coerced and interrogated various employees about their union support in violation of section 8(a)(1) of the Act. Former employee Floriberto Rodriguez testified that at some time during August, 1976, John Surak approached a group of employees (including Rodriguez) asking in English and Spanish, "You all union?" When Rodriguez responded that they knew nothing about the Union, Surak retorted by calling them "mother fucking son of a bitches" before leaving the room.³

Former employee Francisco Robles testified that in October, 1976, John Surak showed him a piece of paper with squares marked "yes" and "no." Surak pointed to the "yes" square and told Robles, "Union no good. Little

³ Although not constituting a violation of sections 8(a)(1) or 8(a)(3), the ALJ noted as background evidence of Sure-Tan's anti-union animus another incident in October in which John Surak told Rodriguez that he was "stupid" and that "You and the union are motherfucker son of a bitches." Rodriguez quit his job with Sure-Tan immediately after this incident.

work." Pointing to the "no" square, Surak told Robles "[T]he Company is good. A lot of work here." Surak then marked the "no" square saying, "O.K. Francisco?" to which Robles replied, "O.K." Robles testified that Surak approached another employee (Primitivo Servantez) in Robles' presence at some time in December before the election and attempted to give that employee similar advice about the "yes" and "no" squares. When Surak was unable to communicate in English with this employee, he asked Robles to translate the message into Spanish. Robles then told Servantez that Surak wanted him to mark the "no" square on his election ballot.

Robles further testified that two hours after the election on December 10, 1976, John Surak addressed a group of employees (which included Robles, Arguimiro Ruiz and Primitivo Servantez) exclaiming "no friends, no amigos," and using the word "immigration." Surak asked the employees, "Union why? Union why?" and he also cursed them saying "Mexican son of a bitch." Surak then asked Robles whether he possessed proper immigration papers; Robles replied that he did not have appropriate documentation. Surak also asked the other employees if they possessed proper immigration papers; Servantez replied, through Robles, that "nobody had papers there."⁴ Employee Albert Strong also testified that after the election on December 10, John Surak told him, "Your dream finally came true, but I won't stay in business."⁵

⁴ The General Counsel also presented to the ALJ the affidavits of three other former Sure-Tan employees who voluntarily departed the United States for Mexico after John Surak informed the immigration authorities that they were probably illegally present in the United States. See section III *infra*. These employees did not appear at the hearing and the ALJ did not credit their affidavits even though they recounted similar instances of threats and interrogations. We agree with the ALJ's assessment of this evidence and further note that the evidence would be merely cumulative of the already sufficient proof supporting the complaint.

⁵ Albert Strong was discriminatorily discharged in violation of section 8(a)(3) by Sure-Tan's predecessor (also owned and

(Footnote continued on following page)

Sure-Tan contends that the ALJ erred by crediting the testimony of Rodriguez, Robles and Strong and that the ALJ's finding of a violation of section 8(a)(1) based upon this testimony is therefore not supported by substantial evidence as required by section 10(e) of the Act, 29 U.S.C. § 160(e) (1976). We must disagree. The only evidence in support of its claim to which Sure-Tan directs our attention is the testimony of John Surak. Surak denied that he made any of the quoted statements or that he threatened or interrogated his employees about their union activities. But the ALJ, who conducted the hearing and observed Surak's demeanor, discredited what he deemed Surak's hesitant and evasive testimony. After reviewing the transcript of the hearing, we cannot conclude that the ALJ erred in discrediting Surak's uncorroborated and self-serving declarations. See *NLRB v. Mars Sales & Equipment Co.*, 626 F.2d 567, 571-72 (7th Cir. 1980). On review, we will fault the Board for accepting an ALJ's credibility determinations only when such determinations are inherently incredible, unreasonable or conflict with the clear preponderance of the evidence. *NLRB v. Hospital and Institutional Workers Union, Local 250*, 577 F.2d 649, 652 (9th Cir. 1978); see *First Lakewood Associates v. NLRB*, 582 F.2d 416, 420 (7th Cir. 1978); *Electri-Flex Co. v. NLRB*, 570 F.2d 1327, 1331-32 (7th Cir.), cert. denied, 439 U.S. 911 (1978). Surak's uncorroborated denials do not meet this standard.

Sure-Tan's contention that Surak's statements do not amount to a violation of section 8(a)(1) is similarly without merit. Under section 8(a)(1), an employer commits an unfair labor practice by "interfer[ing] with, restrain[ing], or coerc[ing] employees in the exercise of the rights guaranteed in section 7 [of the Act]." 29 U.S.C. § 158(a)(1) (1976). Proof of successful interference, restraint or coercion is unnecessary; a violation of section 8(a)(1) is demonstrated by an employer's conduct which tends to interfere with the rights of

⁵ continued

operated by the Surak brothers) for his support of an organizational drive. See *National Rawhide Manufacturing Co.*, 202 N.L.R.B. 893 (1973).

employees to organize a union. *Jays Foods, Inc. v. NLRB*, 573 F.2d 438, 444 (7th Cir.), cert. denied, 439 U.S. 859 (1978). The ALJ was more than justified in concluding that Surak's instructions to Robles and Servantez, implying that a "yes" vote (approving union representation) would result in "little work," constitutes a threat within the ambit of section 8(a)(1). Although free to predict the economic consequences of unionization, an employer unlawfully threatens his employees when he warns of an adverse economic impact without providing an objective basis for the employees to believe that the predicted result is not caused solely at the employer's initiative. *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969); *NLRB v. Gogin*, 575 F.2d 596, 600-01 (7th Cir. 1978).

Moreover, the ALJ justifiably concluded that Surak unlawfully interrogated his employees when he questioned them about their support of unionization. Interrogation violates section 8(a)(1) when, properly viewed in the context of an employee-employer relationship, the employer's questioning may have reasonably induced fear in the employees causing them to refrain from assisting a union. *NLRB v. Gogin*, 575 F.2d 596, 600 (7th Cir. 1978); *Satra Belarus, Inc. v. NLRB*, 568 F.2d 545, 547-48 (7th Cir. 1978). Surak's questions about union support, followed by ethnic slurs, inquiries into the employees' immigration status, occasional ascriptions of canine ancestry and other expressions of Surak's anti-union animus are unarguable and flagrant examples of interrogation prohibited by section 8(a)(1).

II. Additional Threats and Layoffs

The ALJ also found that Sure-Tan violated sections 8(a)(1), 8(a)(3) and 8(a)(4) of the Act, 29 U.S.C. §§ 158(a)(1), (3) & (4) (1976), by reprimanding employee Albert Strong for filing a complaint with the Board. Strong testified that on or about January 31, 1977, he filed a complaint at the local Board office alleging that he had been discriminatorily laid off by Sure-Tan for several weeks after the union election. Shortly after he filed this complaint, John Surak approached Strong at

work and berated him for filing the complaint. Steve Surak then joined in, echoing his brother's claim that Strong was a "dirty son of a bitch" and stating to Strong that "You are trying to get money like you did before."⁶ Several days after this incident, John Surak called Strong a "lazy punk" for failing to move some bags of chemicals. Strong responded by telling Surak that he intended to report Surak to the Board. Later that same day, Steve Surak gave Strong a letter of reprimand.⁷ This was the first letter of reprimand issued to Strong in his 11 years of employment with the Surak brothers.

The ALJ concluded that the Surak brothers' verbal harassment of Strong shortly after he filed a complaint with the Board and the subsequent letter of reprimand⁸ were motivated by Strong's long-standing union support and his effort to invoke the Board's legal processes and, thus, violated sections 8(a)(1), 8(a)(3) and 8(a)(4). Sure-Tan contends that the ALJ erred by crediting Strong's testimony as against the Surak brothers' denial that any of these statements were ever made. The ALJ's credibility determinations must stand, especially when the only contrary evidence consists of the Surak brothers' own self-serving denials.⁹ See *NLRB v. Mars Sales & Equipment Co.*, 626 F.2d 567, 571-72 (7th Cir. 1980).

⁶ This statement apparently referred to the previous charge filed by Strong against the Surak brothers. See note 5 *supra*.

⁷ The letter stated:

This note is to warn you that we are not satisfied with your work. You do not follow the orders and your attitude toward work is very negative. If you will not change this conduct we will terminate your job.

⁸ The ALJ found, and we concur, that the "lazy punk" incident (together with another similar contemporaneous name-calling occurrence not described here) was in itself rather trivial and does not merit an unfair labor practice charge. However, the Surak brothers' subsequent letter of reprimand clearly constituted, as the ALJ found, an overreaction to this minor work dispute. Hence, we will not overturn the Board's finding that the reprimand was motivated by Strong's support of the Union and his recourse to Board processes.

⁹ Indeed, this was not the first time that an ALJ chose to credit Strong's testimony vis-a-vis the Surak brothers. See *National Rawhide Manufacturing Co.*, 202 N.L.R.B. 893, 895-98 (1973).

We also reject Sure-Tan's argument that these findings, which are supported by substantial evidence on the whole record, do not establish violations of sections 8(a)(1), 8(a)(3) and 8(a)(4). The ALJ justifiably concluded that the Surak brothers' threatening remarks and written reprimand addressed to Strong shortly after he filed charges (or, more precisely, indicated his intention to file additional charges) impeded Strong's exercise of protected rights and his access to the Board in violation of sections 8(a)(1) and 8(a)(4). See *NLRB v. Scrivener*, 405 U.S. 117, 121-25 (1972); *NLRB v. Intertherm, Inc.*, 596 F.2d 267, 275-76 (8th Cir. 1979). See generally *Glenroy Construction Co. v. NLRB*, 527 F.2d 465, 468 (7th Cir. 1975). Moreover, the ALJ correctly found, in light of the Surak brothers' demonstrated anti-union animus and the fact that their disciplinary reprimand followed closely on the heels of Strong's resort to Board processes, that the reprimand was discriminatorily motivated and thus violated section 8(a)(3). See *Electric-Flex Co. v. NLRB*, 570 F.2d 1327, 1334-35 (7th Cir.), cert. denied, 439 U.S. 911 (1978). The ALJ's inference seems even more justifiable in view of the circumstances that Strong had never before been reprimanded during his long and sometimes checkered tenure with the Surak brothers. The Suraks' only excuse for this disciplinary action—the alleged insubordination—was clearly pretextual. See *Berbiglia, Inc. v. NLRB*, 602 F.2d 839, 843-45 (8th Cir. 1979).

III. Constructive Discharge

On January 17, 1977, the Board's Acting Regional Director overruled Sure-Tan's objections to the representation election and certified the Union as the collective bargaining agent for Sure-Tan's employees. Sure-Tan received notice of the Acting Regional Director's decision on January 19. On the next day, January 20, 1977, John Surak sent the following letter to the Immigration and Naturalization Service (INS):

We would like to ask you to check the emigration [sic] status of several [of] our employees, who are Mexican nationals:

No. 80-2448

9

Juan P. Florez, also known as Jose Martinez, Social Security Number 338-50-1497

Francisco Robles, Social Security Number 466-11-2550

Ernesto Arreguin, Social Security Number 357-48-2329

Sacramento Serrano, Social Security Number 236-47-5634

Arguimiro Ruiz, Social Security Number 548-06-8995

* * *¹⁰

We appreciate your attention to this request as soon as possible.

Yours very truly,

SURE-TAN, INC.

V. J. Surak

INS agents visited Sure-Tan's premises on February 18, 1977, to check the immigration status of all Spanish-speaking employees. After a short investigation and an interview with Sure-Tan's employees, the INS agents discovered that each of the five employees listed in the quoted letter were living and working illegally in the United States. These employees were then arrested by the INS agents and removed from Sure-Tan's premises. Later that same day, each employee executed an INS Form I-274, by which he acknowledged that he was a Mexican citizen illegally present in the United States. By executing this form, each employee also accepted the INS' grant of voluntary departure as a substitute for deportation.¹¹ Thus, by the end of the day, each of these

¹⁰ The letter also listed several other individuals whose names are not included here because they are not involved in the current charges.

¹¹ Contrary to the apparent assumption of the ALJ, the Board, the General Counsel and counsel for Sure-Tan, these employees were not deported but instead left this country on a grant of voluntary departure. General Counsel's Exhibits 20-

(Footnote continued on following page)

former Sure-Tan employees, at his own expense, was placed aboard a bus bound for El Paso, Texas.

The Board concluded that Sure-Tan constructively discharged these five employees, in violation of sections 8(a)(1) and 8(a)(3), by sending this letter to the INS in retaliation for union activity. Sure-Tan counters this conclusion by arguing that at the time the letter was sent, John Surak had only "doubts" about his employees' immigration status, and that the "deportation" of the employees was the "proximate result" of their illegal status rather than Surak's letter to the INS. We reject Sure-Tan's contentions and affirm the Board's conclusion that Sure-Tan's actions amounted to constructive discharge.

The principle determining liability under section 8(a)(3) is that the employer's conduct affecting an employee's hire, tenure or terms of employment must be motivated, at least in part, by anti-union considerations. *Electri-Flex Co. v. NLRB*, 570 F.2d 1327, 1331 (7th Cir.), cert. denied, 439 U.S. 911 (1978); *Satra Belarus, Inc. v. NLRB*, 568 F.2d 545, 548 (7th Cir. 1978). The existence of a discriminatory motive is a question of fact which the factfinder may resolve by relying on both direct and circumstantial evidence. *NLRB v. Gogin*, 575 F.2d 596, 601 (7th Cir. 1978). Of course, the substantial evidence standard applies to our review of this question, *Gogin*, 575 F.2d at 602, and we shall accord appropriate weight to the Board's findings and conclusions. See *Electri-Flex*, 570 F.2d at 1331-32.

In assessing Sure-Tan's motive for sending the letter to the INS, we first note that both before and after the election, John Surak engaged in various sorts of unlawful conduct (primarily threats and interrogations directed toward his Spanish-speaking employees) which clearly reflected a bald anti-union animus. This evidence

¹¹ continued

25; see 8 U.S.C. § 1254(e) (1976); 8 C.F.R. § 242.5 (1981). This fact is of considerable significance for our analysis of Sure-Tan's arguments regarding the reinstatement and backpay remedy. See section IV *infra*.

of contemporaneous unfair labor practices is highly relevant in establishing motive under section 8(a)(3). See *NLRB v. Tom Wood Pontiac, Inc.*, 447 F.2d 383, 386 (7th Cir. 1971).

Sure-Tan argues, however, that neither of the Surak brothers knew their employees were illegal aliens (although the brothers admit to doubts in the matter). Hence, the Suraks assert they merely performed their civic duty in writing the INS. But the Board found, and the great weight of the evidence supports the Board's finding, that John Surak was well aware that his employees were illegally residing in the United States. Employees Robles and Servantez told Surak shortly after the election that none of his employees possessed the proper immigration papers. Moreover, Surak executed an affidavit on January 10, 1977—10 days before he sent the letter to the INS—stating that a confidential source told him several months before the election that "these men were illegally here." General Counsel's Exhibit 32. Finally, Surak's counsel at the time of the election (who is also counsel for Sure-Tan on this appeal) twice admitted in statements filed with the Board in December following the election (but before the certification of the Union) that one of the grounds for objecting to the election was that "[s]ix of those seven voters are unlawfully residing and working in the United States, those persons being Mexican Nationals who have not received permission or right . . . to reside and work within the United States." General Counsel's Exhibit 11, p. 1; see General Counsel's Exhibit 12, pp. 1-2 (wherein Sure-Tan admits that Surak confirmed the illegal status of his employees by personally quizzing each about his immigration status). Quite apart from any doubts we may have of the accuracy of Sure-Tan's affidavits filed with the Board and its assertions on this appeal, we are, based upon inconsistent factual positions taken at one time or another by the Suraks,¹² unwilling to overturn

¹² We note that the argument advanced by counsel on this appeal regarding the Surak brothers' knowledge of the illegal alien status of these employees borders on the ludicrous when considered in connection with the prior affidavits of fact procured by this same counsel.

the Board's conclusion that "John Surak . . . was aware that most of his employees were illegal aliens." 234 N.L.R.B. at 1190 (footnote omitted).

Sure-Tan also challenges the ALJ's finding of a section 8(a)(3) violation by arguing that the letter to the INS does not amount to a "constructive discharge." Section 8(a)(3) is violated only when the employer's discrimination affects "hire," "tenure" or a "term or condition of employment." 29 U.S.C. § 158(a)(3) (1976). Constructive discharge occurs, and may give rise to a section 8(a)(3) violation, even though the employer does not directly or forthrightly terminate an employee but rather creates working conditions so intolerable that the employee is forced to resign. See *Cartwright Hardware Co. v. NLRB*, 600 F.2d 268, 270 (10th Cir. 1979); *J.P. Stevens & Co. v. NLRB*, 461 F.2d 490, 494 (4th Cir. 1972). For purposes of section 8(a)(3), two elements are required to establish a constructive discharge. "First, the employer's conduct must have created working conditions so intolerable that an employee is forced to resign. Second, the employer must have acted 'to encourage or discourage membership in any labor organization' within the meaning of section 8(a)(3) of the Act." *NLRB v. Haberman Construction Co.*, 641 F.2d 351, 358 (5th Cir. 1981) (en banc) (quoting 29 U.S.C. § 158(a)(3) (1976); accord *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26, 32-34 (1967).

Sure-Tan's argument here that any intolerable condition forcing termination was created by the employees' status as illegal aliens is specious. By putting the INS on notice of these alien employees when it knew of their illegal status, Sure-Tan took action which was the proximate cause of their departure. Indeed, the INS agent who conducted the investigation testified that John Surak's letter "precipitated" his inspection and investigation. Surak, when he sent this letter, surely foresaw and intended the ultimate result of the INS' investigation. Moreover, we reject Sure-Tan's argument that it was legally obligated to disclose the presence of the alien employees to the INS. Sure-Tan has not cited, nor has our research disclosed, any provision in the INA which requires an employer to notify the INS that he employs

illegal aliens.¹³ Although there is some authority that "[a]n employer who suspects that an employee is in the United States without proper authority should report this information to the INS," *NLRB v. Apollo Tire Co.*, 604 F.2d 1180, 1183 (9th Cir. 1979), an employer has no right to rely on a "moral obligation" to report illegal aliens (of which he has been previously oblivious) merely to sanctify an otherwise unjustifiable violation of section 8(a)(3). See *NLRB v. Sure-Tan, Inc.*, 583 F.2d 355, 360 n.9 (7th Cir. 1978).¹⁴ A contrary holding would en-

¹³ Under the current statutory scheme, the alien who unlawfully enters this country to seek employment without obtaining proper certification violates the INA. See 8 U.S.C. § 1182(a)(14) (Supp. I 1977). An alien's illegal status under the INA does not, as Sure-Tan contends, immunize an employer's constructive dismissal of an alien employee which is motivated by anti-union animus. Although an alien's inability to procure proper authorization from the INS to reside and work in the United States might, standing alone, constitute sufficient grounds for discharge, there is no authority under either the NLRA or the INA sanctioning a constructive discharge which is otherwise invalid under section 8(a)(3), based on the employee's status as an illegal alien. Even if the instant case could properly be classified as a "mixed motive" case because of the presence of a potentially justifiable reason for the constructive discharge, we believe that the General Counsel clearly sustained his burden of demonstrating an illegal motive under the Act for Sure-Tan's conduct, and Sure-Tan has not rebutted this evidence. Specifically, Sure-Tan has not shown that absent anti-union animus, it would have engineered these employees' departures. See *NLRB v. Eldorado Mfg. Corp.*, 660 F.2d 1207 (7th Cir. 1981).

¹⁴ We are not so naive as to believe that Sure-Tan does not share some practical blame in this case for any alleged violation of the immigration laws. We find it difficult to believe that a metropolitan Chicago employer can employ a work force almost exclusively made up of Spanish-speaking men of Mexican origin at wages within pennies of the minimum wage (and at hard and unappetizing work) without even suspecting that some of these employees are illegal aliens. There seems nothing like a successful union election to concentrate an employer's mind on the color of its workers' visas (if they exist) and on its moral obligations to expel its (once faithful) employees from the country.

courage employers to hire illegal aliens, who would for all practical purposes be stripped of NLRA protection and who could be fired with impunity at the first hint of union sympathy.

The second requirement of the *Haberman* test—that the employer has acted with an anti-union animus—is also flagrantly met in this case.¹⁵ The record is replete with examples of Sure-Tan's blatantly illegal course of conduct to discourage its employees from supporting the Union. We have already concluded that the Surak brothers threatened, coerced and interrogated their employees in violation of sections 8(a)(1), 8(a)(3) and 8(a)(4). In a related proceeding, another panel of this court has held that Sure-Tan violated section 8(a)(5) of the Act by refusing to bargain with the Union after the INS granted voluntary departures to the five employees who are the subjects of this appeal. *NLRB v. Sure-Tan, Inc.*, 583 F.2d 355 (7th Cir. 1978). The close time relationships involved shed a clear light on Sure-Tan's motives. Sure-Tan sent the letter to the INS only *one day* after receiving the Regional Director's order overruling Sure-Tan's objections to the election and requiring Sure-Tan to bargain with the Union. Sure-Tan's deathbed conversion to enthusiastic enforcement of the immigration laws, which, of course, coincided with the Union's victory in the representation election, can hardly provide it with any defense under section 8(a)(3). In fact, in this case as probably in others the immigration laws

¹⁵ We note that proof of an anti-union motive is not required under the second part of the *Haberman* test when the employer's conduct is inherently destructive of employee rights. *Haberman*, 641 F.2d at 359-60. The employer's conduct in the instant case is properly characterized as inherently destructive of employee rights because Sure-Tan's letter to the INS, which lead to the voluntary departure of at least half of Sure-Tan's work force, effectively "jeopardize[d] the position of the union as bargaining agent or diminishe[d] the union's capacity . . . to represent the employees in the bargaining unit." *Haberman*, 641 F.2d at 359. Notwithstanding the attractiveness of this analysis, we think that in this case of first impression, we should carefully analyze Sure-Tan's allegations that no anti-union animus capable of supporting a section 8(a)(3) violation is present in this case.

have provided an employer with a powerful tool for unfair and oppressive treatment of migrant labor. The immigration laws have been conveniently employed to impose the ultimate penalty of discharge (and deportation or its equivalent) if migrant laborers should have the effrontery to join a union. As Chief Judge Cummings noted in our first *Sure-Tan* case, "it ill becomes the Company to argue after losing the election that certification would conflict with the immigration laws." 583 F.2d at 360.

We think the Board correctly concluded that *Sure-Tan* constructively discharged these five employees in violation of section 8(a)(3).

IV. *Remedy*

The most difficult problem presented on this appeal is the appropriateness of the relief ordered by the Board for the five constructively discharged alien employees. The ALJ concluded that the conventional remedy of backpay and reinstatement was "inadequate" in this case because the constructively discharged employees were illegal aliens "deported" to Mexico. 234 N.L.R.B. at 1192. In place of the conventional remedy, the ALJ recommended that the Board order *Sure-Tan* to mail letters to the five discriminatees at their last known addresses in Mexico, offering them reinstatement to their former or equivalent positions; these offers were to remain open for six months. The ALJ declined to recommend an award of backpay "[s]ince the above employees were not available for employment." 234 N.L.R.B. at 1192-93.

The Board refused to adopt the ALJ's recommended remedy. Noting that there was no evidence in the record supporting the ALJ's conclusion that the discriminatees have not returned to the United States, the Board concluded that the question of availability for work should be determined in a compliance proceeding. Thus, the Board modified the ALJ's order by substituting the "conventional remedy of reinstatement with backpay." 234 N.L.R.B. at 1187.

The General Counsel subsequently filed a motion for clarification with the Board directed solely at the

remedy. Although admitting "that certain . . . remedial issues in this case may ultimately involve factual matters which are best resolved in a compliance proceeding," the General Counsel argued that *Sure-Tan* "is uncertain as to what its obligations are, and thus has questions concerning what it must do to achieve compliance." In particular, the General Counsel suggested that the Board's order might violate the national immigration laws and policies because it requires reinstatement and backpay without regard to the legality of the discriminatees' immigration status. Because he thought that such an interpretation "must be wrong," the General Counsel suggested that the Board adopt one of several other remedial formulas which would presumably not conflict with immigration laws or policies.

The Board denied the General Counsel's clarification motion. *Sure-Tan, Inc.*, 246 N.L.R.B. 788 (1979). Noting "that the remedial policies of the Act will be best effectuated in this case by affording the discriminatees full protection notwithstanding the circumstances attendant to their illegal discharge," the majority explained that the usual procedures governing the backpay and reinstatement claims, as implemented in a compliance proceeding, were both sufficient and appropriate for this case. 246 N.L.R.B. at 788. Members Penello and Murphy dissented, arguing that by failing to distinguish between lawfully and unlawfully resident discriminatees, the Board's order encouraged aliens to enter the country illegally to secure their reinstatement and backpay.

Upon the Board's application to enforce its order, *Sure-Tan* argues that the award of reinstatement and backpay, without regard to the immigration status of the employees seeking reinstatement, defeats the policies of our immigration laws and fails to carry out the policies of the NLRA. *Sure-Tan* also contends that a letter it sent to the five discriminatees offering them reinstatement "provided only that [their] reemployment shall not subject *Sure-Tan, Inc.* to any violations of United States immigration laws" was an unconditional offer of reinstatement and, thus, *Sure-Tan* has satisfied the Board's requirements in this regard. We separately consider each of these contentions.

A. *Propriety of Backpay and Reinstatement*

We reject Sure-Tan's argument that under the circumstances of this case an award of reinstatement and backpay cannot be reconciled with the laws and policies governing both immigration and labor relations. Sure-Tan's objection to the Board's remedial order, relying on the immigration laws, is premised in part on the assumption that the five discriminatees were deported. By awarding these "deported" discriminatees backpay and reinstatement, Sure-Tan contends that the Board has encouraged these aliens to re-enter the United States, even though the re-entry of deported aliens is a felony. See 8 U.S.C. § 1326 (1976). As we noted in section III, *supra*, the INS did not *deport* the discriminatees; rather, the INS granted to them the privilege of *voluntary departure*. General Counsel's Exhibits 20-25; see 8 U.S.C. § 1254(e) (1976). Aliens who depart voluntarily avoid the stigma of deportation and enhance the possibility of their lawful return to the United States at a later date. *Jain v. INS*, 612 F.2d 683, 686 n.1 (2d Cir. 1979), *cert. denied*, 446 U.S. 937 (1980); *Strantzalis v. INS*, 465 F.2d 1016, 1017 (3d Cir. 1972) (*per curiam*); *Tzantarmas v. United States*, 402 F.2d 163, 165 n.1 (9th Cir. 1968), *cert. denied*, 394 U.S. 966 (1969).¹⁶ Because these discriminatees were not deported, the felony provisions of 8 U.S.C. § 1326 are not applicable, and the Board correctly concluded that they might return lawfully to this

¹⁶ Deported aliens may reenter the United States only if they first secure the Attorney General's consent for reapplication for admission. 8 U.S.C. § 1326(2) (1976). Aliens who voluntarily depart need not secure prior approval from the Attorney General before seeking admission; likewise they are not necessarily prohibited from reapplying for admission to this country. Indeed, there is nothing in the INS regulations governing the certification of temporary alien workers, such as the alien discriminatees in this case, that prohibits the INS from lawfully certifying these discriminatees for admission in the future upon reapplication notwithstanding a previous voluntary departure. See 8 C.F.R. § 212.8 (1981).

country to reclaim their positions at Sure-Tan.¹⁷ The Board also determined that such a lawful return might take place soon.

It obviously remains a possibility, however, that the discriminatees in this case might be motivated to re-enter the United States unlawfully to claim reinstatement and backpay. But, as a practical matter we believe it unlikely that a discriminatee would attempt to illegally enter the United States primarily to pursue his remedies and thus draw attention to his illegal alien status. Indeed, the economic and social attractions which generally encourage illegal migration to this country are probably more compelling inducements than the special fruit of the Board's order might be in this case. Thus, under the specific facts of this case, the Board's grant of the conventional remedy of backpay and reinstatement does not clearly flout the immigration laws (although here, as explained *infra*, we think that the Board's remedy should be modified in some aspects).

We also reject Sure-Tan's argument that backpay and reinstatement for these discriminatees would not carry out the purposes of the NLRA. Section 10(c) of the Act grants to the Board broad discretion in devising remedies for unfair labor practices. See *NLRB v. United Contractors, Inc.*, 614 F.2d 134 (7th Cir. 1980); *NLRB v. Fort Vancouver Plywood Co.*, 604 F.2d 596 (9th Cir. 1979), *cert. denied*, 445 U.S. 915 (1980). Sure-Tan correctly notes that in most cases where reinstatement orders are not upheld, the reinstated employees were guilty of unlawful or offensive conduct. See, e.g., *NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240 (1939);

¹⁷ This point also distinguishes the instant case from *Southern Steamship Co. v. NLRB*, 316 U.S. 31 (1942). In *Southern Steamship*, the Court held that the Board's remedial order of backpay and reinstatement for striking seamen was unenforceable because it conflicted with another statute prohibiting strikes or mutinies by seamen by encouraging these prohibited acts. In the instant case, the Board's order does not conflict with the immigration laws since it does not necessarily encourage or sanctify *illegal* immigration of the discriminatees from Mexico.

Nebraska Bulk Transport v. NLRB, 608 F.2d 311, 316-17 (8th Cir. 1979); *NLRB v. National Furniture Manufacturing Co.*, 315 F.2d 280, 286 (7th Cir. 1963). These authorities teach, however, that an employee's unlawful or offensive conduct, to be of significance, must relate directly either to his ability to perform his work duties or to the compatibility between employer and employee. The immigration violations of these discriminatees, though unlawful (and conceivably "offensive"), have no bearing on the employees' ability to perform Sure-Tan's work. Nor is there any showing (relating to immigration status or otherwise) that any basic antagonism exists which interferes with harmonious employer-employee relations.

Moreover, the purpose of backpay in cases such as this is to vindicate public policy by making employees whole for their losses caused by the employer's unfair labor practices. *NLRB v. J. H. Rutter-Rex Manufacturing Co.*, 396 U.S. 258 (1969). It would be anomalous to encourage the honest toil of illegal aliens, accepting it with the understanding that these workers had the rights of employees under the Act, but then, when violations occur, to deny them such rights by refusing effective remedies. Indeed, the rights of both alien and non-alien employees under the Act are flouted if employers are free to discriminate against alien employees who exercise their right to form and join unions. This is precisely what happened here since Sure-Tan, by constructively discharging these alien employees, destroyed the bargaining unit and thus undermined the Union's support during the crucial period immediately after certification. Both reinstatement and backpay are justified under the circumstances to vindicate the policy of the Act and to deter similar conduct by other employers in the future.¹⁸ We, however, believe that both branches of

¹⁸ Sure-Tan also argues that the Board erred by determining that many of the remedial issues in this case, including the apparent conflicts between the Board's conventional remedy and the INA, should not be resolved until the Board's order is implemented in a compliance proceeding. In view of our dis-

(Footnote continued on following page)

this conventional remedy must be subjected to limitations as set forth *infra*.

B. *Sure-Tan's Offer Of Reinstatement and Modification of Conventional Remedy*

On March 29, 1977, Sure-Tan mailed letters to the five discriminatees. In these letters, Sure-Tan offered to reinstate each discriminatee, "provided ... that [his] reemployment shall not subject Sure-Tan, Inc. to any violations of United States immigration laws." Company Exhibit No. 1. The offer remained open until May 1, 1977. The letters were written in English and mailed to each discriminatee at his last known address in Mexico. There is not proof, however, that any of the discriminatees actually received Sure-Tan's letter.

The ALJ found that these letters did not constitute adequate offers of reinstatement. As part of his proposed order, the ALJ recommended that Sure-Tan make another offer of reinstatement (with receipt to be verified) to these employees, which would be kept open for a six month period. The Board, "[w]ithout passing on these points," found "that the [employer's] offers were deficient because they were expressly conditioned on [Sure-Tan's] not being found in violation of United States immigration laws." 234 N.L.R.B. at 1187 n.3. Sure-Tan contends that these letters were unconditional offers of reinstatement since the stated condition—reemployment which does not subject Sure-Tan to legal liability under the immigration laws—is not a legal impediment preventing reinstatement. We think that as a practical matter, Sure-Tan is correct in its contentions.

¹⁸ *continued*

position of this case, *infra*, we need not discuss these contentions. Nevertheless, we note that many other issues in this case, such as computation of the dollar amount of backpay and unavailability for employment (which may toll backpay) are usually determined only in compliance proceedings. *Zims Foodliner, Inc. v. NLRB*, 495 F.2d 1131 (7th Cir.), *cert. denied*, 419 U.S. 838 (1974).

When an unconditional offer of reinstatement is made to discriminatees who were discharged due to an employer's unfair labor practice, the employer's backpay liability is generally tolled from the time of the offer. *NLRB v. Huntington Hospital, Inc.*, 550 F.2d 921, 924 (4th Cir. 1977); *Kenston Trucking Co. v. NLRB*, 544 F.2d 1165 (2d Cir. 1976) (per curiam). In this case, the Board held that Sure-Tan's March 29 letters were *conditional* offers of reinstatement; thus, at the present time Sure-Tan has not yet, according to the Board, tolled its backpay liability.

Sure-Tan properly argues that the conditions expressed in its letter are not legal impediments barring the reinstatement of the discriminatees. Because an employer does not violate the immigration laws by employing an illegal alien, these discriminatees could not subject Sure-Tan to any legal liability by applying for, or receiving, reinstatement. Whether or not the "condition" contained in this reinstatement offer constitutes a legal impediment to these discriminatees does not, however, dispose of the issue before us. In determining whether a reinstatement offer is conditional or unconditional, we should not consider either the legal effect of the condition or even the employer's good faith in making the offer. Rather, we must focus on the understanding of an alleged condition by discriminatees who received the reinstatement offers. See *NLRB v. Murray Products, Inc.*, 584 F.2d 934, 942 (9th Cir. 1978).

Following this approach, we do not agree with the Board's determination that Sure-Tan's reinstatement offer would be understood by the discriminatees as a "conditional" offer of reinstatement. The discriminatees were well aware, at least after their voluntary departure (if not before), that they can legally work and reside in the United States only if they secure the proper visas and other authorizations. Therefore, the "condition" expressed in Sure-Tan's letter would in all likelihood be construed by persons in the position of these discriminatees as requiring them to enter the country legally before seeking reinstatement. Moreover, in a setting where anti-union animus is not present and since illegal entry would presumably represent just cause for

discharge, the employer may presumably refuse lawfully to rehire a previously discharged alien if the alien has not entered the country legally to reclaim his job. See 29 U.S.C. § 160(c) (1976).

This analysis points to a reconciliation of the remedies of backpay and reinstatement with the policies underlying the national immigration laws. As previously noted, we are not convinced that these conventional remedies (as applied here by the Board) would necessarily encourage illegal immigration. Nevertheless, particularly because of the attention now focused by the government on these discriminatees and their employer, it is appropriate for this employer to remind the discriminatees that they may not legally enter the United States to claim these jobs without proper documents. Despite its frailties of draftsmanship, we believe Sure-Tan's offer, at least for the purposes of this case, should be regarded as unconditional. Further, and consistent with our analysis of Sure-Tan's reinstatement offer, we think the Board's remedial order must be modified to require reinstatement only if the discriminatees are legally present and legally free to be employed in this country when they offer themselves for reinstatement.

On the other hand, we agree with the ALJ that Sure-Tan's letter did not give the discriminatees a reasonable time to consider the offer and make arrangements for legally entering the United States. See *NLRB v. Murray Products, Inc.*, 584 F.2d 934, 940 (9th Cir. 1978). But, we disagree with his recommendation that the offer be left open only for a six month period. Under the circumstances of this case (where legal re-entry into the United States may require years of effort), the offer should remain open for a period of four years to afford the discriminatees a liberal but reasonable opportunity to reclaim their jobs. Moreover, we agree with the ALJ that the offers made by Sure-Tan were inadequate because they were not delivered to the discriminatees in a manner allowing verification of receipt and they were not written in the discriminatee's native language (Spanish). Because its offers were defective to this extent, Sure-Tan must again make offers of reinstatement to the discriminatees consistent with this opinion and

the Board's order as we have modified it. The new offers, rather than the earlier ones, will terminate the possible accrual of backpay.

Consistent with our requirement that there be reinstatement only if the discriminatees are legally present and permitted by law to be employed in the United States, we modify the Board's order so as to make clear (1) that (except for the modification hereinafter permitted) in computing backpay discriminatees will be deemed unavailable for work during any period when not lawfully entitled to be present and employed in the United States, and (2) that backpay need not be placed in escrow for more than one year.¹⁹

We have one further concern, in view of the statutory direction that the Board shall order such remedial action as will effectuate the policies of the Act. See 29 U.S.C. § 160(c). In the circumstances of this case it may well be that the discriminatees will not have been lawfully available for employment in the United States prior to the date of the new offers of reinstatement which will be required. In that event the discriminatees will receive no backpay. It seems to us that it would better effectuate the policies of the Act to set a minimum amount of backpay which the employer must pay in any event, because it was his discriminatory act which caused these employees to lose their jobs. Although later independent detection of them by INS would doubtless have had the same result, we think the Board could fix a time which is the minimum during which the discriminatees might reasonably have remained employed without apprehension by INS, but for the employer's unfair labor practice. Although that period of time is obviously conjectural, we think that six

¹⁹ The Board should utilize a slightly modified escrow procedure similar to the procedure followed in *NLRB v. Brown & Root, Inc.*, 311 F.2d 447 (8th Cir. 1963), *clarified*, 327 F.2d 958 (8th Cir. 1964), to insure that amounts deposited in escrow by Sure-Tan to comply with its backpay liability, if any, will be refunded if the discriminatees fail to make an application for backpay within one year.

months is a reasonable assumption. In any event, we believe six months' backpay is a minimum amount for purposes of effectuating the policies of the Act.

We will therefore enforce the Board's order as modified, but will give leave to the Board, if it sees fit, to modify it further by setting a minimum period of six months during which backpay will be awarded in any event, and we will also grant enforcement of the order as so modified.

ORDER ENFORCED AS MODIFIED.

A true Copy:

Teste:

*Clerk of the United States Court of
Appeals for the Seventh Circuit*

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

July 12, 1982

Before

Hon. RICHARD D. CUDAHY, Circuit Judge
Hon. THOMAS E. FAIRCHILD, Senior Circuit Judge
Hon. WESLEY E. BROWN, Senior District Judge*

NATIONAL LABOR RELATIONS
BOARD,

Petitioner,

No. 80-2448 vs.

SURE-TAN, INC., AND SURAK
LEATHER CO.,

Respondent

Petition for Enforcement of an
Order of the National Labor
Relations Board.

ORDER

The Board has submitted a proposed judgment order pursuant to the court's opinion enforcing as modified the Board's findings of unfair labor practices committed by Respondents. *NLRB v. Sure-Tan, Inc.*, 672 F.2d 592 (7th Cir. 1982). Objections to the Board's proposal were filed by the Respondents appearing *pro se*. We adopt the proposed judgment order as modified herein.

Under the proposed judgment order submitted by the Board, the alien discriminatees would receive backpay (with interest) as traditionally computed by the Board. *See F. W. Woolworth Co.*, 90 N.L.R.B. 289 (1950). In addition, the

* The Honorable Wesley E. Brown, Senior District Judge for the District of Kansas, is sitting by designation.

proposed judgment order stated that "[i]f any of the discriminatees have not been located after the [four year] reinstatement period has expired, the Respondent will place in escrow money sufficient to satisfy its possible backpay liability, but such money will be refunded if the discriminatee has not been located within one year."

Although our opinion did approve an award of backpay to these discriminatees, the procedure established here by the Board for collecting these potential backpay awards does not fully accord with our modification of the Board's traditional remedy in this case. As we interpret the Board's proposed judgment order, the alien discriminatees could collect their backpay awards anytime within *five years* after Respondents make valid reinstatement offers (four year reinstatement period plus one year escrow periods). Moreover, backpay might continue to accrue during this period under the Board's proposed judgment order. It appears that in adopting this procedure, the Board probably followed its general rules regarding the tolling of backpay liability. The Board generally tolls backpay liability either when the discriminatee accepts reinstatement, rejects reinstatement, or, for discriminatees who do not reply, on the last day for accepting the reinstatement offer. See *American Manufacturing Co. of Texas*, 167 N.L.R.B. 520, 521 (1967). Since the Respondents here must keep the reinstatement offers open for four years, the Board might have concluded, under *American Manufacturing*, that Respondents' backpay liability could extend for four years, or, at least, that for the discriminatees who did not reply to the offer, the backpay period would be tolled at the end of four years, *i.e.*, the last day for accepting reinstatement under our modified remedy.

We declined, however, to apply the Board's traditional rule regarding the tolling of backpay liability in this case. In an effort to effectuate the policies of the NLRA, we extended the reinstatement period to four years—a period far exceeding the

typical reinstatement period in cases involving non-alien discriminatees. *See, e.g., NLRB v. W. C. McQuaide, Inc.*, 552 F.2d 519, 529-30 (3d Cir. 1977) (less than two weeks held reasonable period to hold open reinstatement offers). To extend backpay liability and the period for collecting backpay throughout this four year period would not effectuate the policies of the NLRA. Thus, we also provided in the opinion that the Respondents' backpay liability would be tolled *from the date the offers of reinstatement are made by Respondent*. 672 F.2d at 605.¹

After the offers are made by Respondent, we assume that the Board will hold hearings within several months thereafter to establish the gross amount of backpay owed to these discriminatees. The Board is, of course, obliged, to the best of its ability, to make the discriminatees available for cross-examination by Respondents at this hearing to establish interim earnings and any other setoffs applicable to the backpay awards. *See N.L.R.B. v. Mastro Plastics Corp.*, 354 F.2d 170 (2d Cir. 1965), *cert. denied*, 384 U.S. 972 (1966).² The escrow procedure adopted in our opinion of February 24, 1982, would apply to those discriminatees who do not appear at the backpay hearing. If a claim is not made within one year, "the award shall be considered to have lapsed, and . . . the amounts of lapsed awards, if any, shall be refunded to respondents." *N.L.R.B. v. Brown & Root, Inc.*, 311 F.2d 447, 456 (8th Cir.

¹ Section 2(b)(1) of the Board's proposed judgment order implicitly provides that the backpay period is not tolled until the discriminatees *receive* the reinstatement offers. We have modified this in accord with our opinion as discussed in more detail *infra*.

² Although the discriminatees are Mexican aliens, the Board may still secure temporary short-term visas for them to allow them to enter the country to testify at the hearing. The General Counsel successfully followed such a procedure when he secured the testimony of one of the discriminatees at the unfair labor practice hearing.

1963). Thus, the escrow period will arise after valid reinstatement offers are made and the hearing is held, and not at the end of the four-year reinstatement period.

Regarding the computation of backpay, we have also modified section 2(b)(1) of the Board's proposed judgment order to provide that a minimum of six months' backpay will be awarded on demand to each of the discriminatees regardless of the specifics of their lawful availability for employment during the backpay period. If a discriminatee was in fact lawfully available for employment, his backpay should be computed for the period of his lawful availability. If that period is less than six months, he should be deemed lawfully available for six months. Of course, if he was in fact lawfully available for more than six months, that period would be the relevant backpay period. Our opinion also expressed concern that some discriminatees might never recover any backpay because they would be unable to show that they were lawfully available for reemployment at any time during the backpay period. *See* 672 F.2d at 606. We invited the Board to adopt a procedure in this case to provide backpay for discriminatees in this situation, and we suggested that six months' backpay would be appropriate. After reviewing the proposed judgment order, we are uncertain whether the Board has adopted this suggestion. We have now concluded that the policies of the NLRA are furthered in this admittedly unique case only if discriminatees unable to show legal availability are nonetheless awarded a minimum of six months' backpay (of course subject to clearly mandatory and conclusively established setoffs, if any), and we have thus modified the Board's judgment order to effectuate this decision.

We do not fault the Board for misconstruing our intent in these matters. Admittedly, we did not consider these problems in detail in our opinion; we hope the instant order will provide detailed answers to outstanding questions. The Board's proposed judgment order, as modified, herein, is hereby adopted.

Modification

Section 2(b)(3) is modified as follows:

Respondent's backpay liability shall be tolled from the date valid offers of reinstatement are mailed to the discriminatees in accordance with the requirements of section 2(a). The Board will hold a hearing to determine backpay liability shortly after these offers are made. The Respondent will place in escrow money sufficient to satisfy its potential backpay liability for those employees who do not appear at the Board hearing, but such money will be refunded if the discriminatee has not been located within one year.

Section 2(b)(1) is modified as follows:

Before awarding any backpay, the Board will determine whether any of the discriminatees were lawfully available for employment during the backpay period (*i.e.*, between the date of their illegal constructive discharge and the date respondent mails valid offers of reinstatement). If a discriminatee was lawfully available for employment for a period of less than six months during the backpay period, he shall be deemed to have been available for at least six months. If a discriminatee was not lawfully available for employment at any time during the backpay period, he shall be deemed to have been legally available for employment for six months only for purposes of awarding backpay.

The Board will substitute these paragraphs at the appropriate places in the attached judgment order.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit

NATIONAL
LABOR RELATIONS BOARD,
Petitioner,

v.

No. 80-2448

SURE-TAN, INC. AND
SURAK LEATHER CO.,
Respondent.

JUDGMENT

Before: CUDAHY, Circuit Judge, FAIRCHILD, Senior Circuit Judge, and BROWN, Senior District Judge.*

THIS CAUSE came on to be heard upon the application of the National Labor Relations Board for the enforcement of a certain order issued by it against Respondent, Sure-Tan, Inc. and Surak Leather Co., Chicago, Illinois, its officers, agents, successors, and assigns on March 6, 1978. The Court heard argument of respective counsel on September 30, 1981, and has considered the briefs and transcript of the record filed in this cause. On February 24, 1982, the Court, being fully advised in the premises, handed down its decision granting enforcement of the Board's Order, as modified. In conformity therewith, it is hereby

ORDERED AND ADJUDGED by the Court that Respondent, Sure-Tan, Inc. and Surak Leather Co., Chicago, Illinois, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership in, support for, or activities on behalf of Chicago Leather Workers

* The Honorable Wesley E. Brown, Senior District Judge for the District of Kansas, is sitting by designation.

Union, Local 43L, Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO (hereinafter called the Union) by: threatening to notify the Immigration Service because of employees' support for the Union; notifying the Immigration Service and requesting a check on their status because of their support for the Union and thereby resulting in their deportation from the country and their constructive discharge; interrogating employees about their union sentiments and sympathies and that of their fellow employees; threatening employees with less work if they supported the Union; promising employees more work if they did not support the Union.

(b) Verbally harassing employees and issuing them written reprimands because of their attempts to obtain Board assistance and because they support the Union.

(c) In any other manner interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the National Labor Relations Act (hereinafter called the Act).

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Offer Francisco Robles, Ernesto Arreguin, Sacramento Serrano, Arguimino Ruiz, and Juan P. Flores immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges. These offers must be written in Spanish, must provide that they remain open for four years after receipt, and must be delivered in a manner allowing verification of receipt. These offers must advise the discriminatees that Respondent has no obligation to reinstate them unless they are legally present in the United States and legally free to be employed when they offer themselves for reinstatement.

(b) Make these discriminatees whole for wages lost as a result of their unlawful discharge, subject to the following conditions:

(1) The discriminatees will be deemed unavailable for work during any period when not lawfully entitled to be present and employed in the United States, except that any discriminatee who was lawfully available for employment in the United States for less than six months between the date of his discharge and the date he received the Respondent's valid offer of reinstatement will be deemed to have been so available for six months.**

(2) Backpay is to be computed in the manner prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950), with interest as prescribed in *Florida Steel Corporation*, 231 NLRB No. 117 (1977). (See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).)

(3) If any of the discriminatees have not been located after the reinstatement period has expired, the Respondent will place in escrow money sufficient to satisfy its possible backpay liability, but such money will be refunded if the discriminatee has not been located within one year.

(c) Expunge from the personnel record of Albert Strong the letter of reprimand dated February 11, 1977.

(d) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payments records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Judgment.

(e) Post at its premises in Chicago, Illinois, copies of the attached notice marked "Appendix." Copies of said notice shall be in English and Spanish, on forms provided by the Regional Director Region 13 of the National Labor Relations Board (Chicago,

** To be modified as directed by the court's judgment order.

Illinois), and after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by other material. In addition, Respondent will mail a copy of such notice to the discriminatees at their last known address.

(f) Notify the aforesaid Regional Director, in writing, within 20 days from the date of this Judgment, what steps the Respondent has taken to comply herewith.

Circuit Judge, United States Court
of Appeals for the Seventh Circuit

APPENDIX

NOTICE TO EMPLOYEES

POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER, AS MODIFIED, OF THE NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

WE WILL NOT cause the constructive discharge of employees by requesting the Immigration and Naturalization Service to investigate the status of known illegal aliens because of their selection of and support for the Chicago Leather Workers Union, Local 43L, Amalgamated Meat Cutters and Butcher Workmen of North America, AFL—CIO, or any other Union, with knowledge that such employees have no papers or work permits.

WE WILL NOT interrogate employees about their union sentiments and sympathies or that of other employees.

WE WILL NOT threaten employees who are illegal aliens with notification of the Immigration and Naturalization Service because of their selection or support of a union.

WE WILL NOT threaten employees with less work if they support the Union.

WE WILL NOT promise employees more work if they do not support the Union.

WE WILL NOT verbally harass employees or issue them written reprimands if they attempt to use the Board's processes or if they support the Union.

WE WILL NOT in any other manner interfere with, restrain, or coerce employees in the exercise of rights protected under the National Labor Relations Act.

WE WILL offer Francisco Robles, Arguimino Ruiz, Juan P. Flores, Ernesto Arreguin, and Sacramento Serrano immediate and full reinstatement to their former jobs or, if these jobs no longer exist to substantially equivalent positions of employment without prejudice to their seniority or other rights and privileges, and pay them for loss of earnings suffered because of being constructively discharged on February 18, 1977.

WE WILL remove the reprimand of February 11, 1977, from the personnel records of Albert Strong.

SURE-TAN, INC. AND SURAK LEATHER CO.
(Employer)

Dated _____ By _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Everett McKinley Dirksen Building, 219 S. Dearborn Street, Chicago, Illinois 60604, Telephone 312-353-7597.

In the

United States Court of Appeals
For the Seventh Circuit

No. 80-2448

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

SURE-TAN, INC., and SURAK LEATHER CO.,

Respondent.

On Petition for Rehearing and Suggestion
for Rehearing *En Banc*

MAY 5, 1982

Before CUDAHY, *Circuit Judge*, FAIRCHILD, *Senior Circuit Judge*, and BROWN, *Senior District Judge*.*

ORDER

On consideration of the petition for rehearing and suggestion for rehearing *en banc* of 672 F.2d 592 (7th Cir. 1982), filed in the above-entitled cause by respondent, Sure-Tan, Inc. and Surak Leather Co., a vote of the active members of the Court was requested, and a majority of the active members of the Court did not vote

* The Honorable Wesley E. Brown, Senior District Judge for the District of Kansas, is sitting by designation.

to grant a rehearing *en banc*.^{*} All of the judges on the original panel have voted to deny the petition for rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

WOOD, *Circuit Judge*, with whom PELL and COFFEY, *Circuit Judges*, join.

In *Sure-Tan I*,¹ the majority held that illegal aliens, who had no right to be in this country and no right to hold a job, could nevertheless, by their vote in favor of the union as their bargaining agent, bind this business and its subsequent new employees. After voting, all those illegal alien employees, with considerable justified encouragement from the Immigration and Naturalization Service, returned home quickly, but left the business and its new employees to live with the union decision. *Sure-Tan I* was followed by the Ninth Circuit in *NLRB v. Apollo Tire Co., Inc.*, 604 F.2d 1180, 1183 (9th Cir. 1979), but I stand by my dissent in *Sure-Tan I* that the sensible solution, under these "unusual circumstances," would have been simply to hold a new election. As suggested in that dissent, what is needed is for Congress to act² to relieve some of the tension between labor and immigration policies.³

That original mistake in *Sure-Tan I* has now inevitably spawned related problems which had to be ad-

^{*} Circuit Judges Pell, Wood and Coffey voted to grant a rehearing *en banc*.

¹ *NLRB v. Sure-Tan, Inc.*, 583 F.2d 355 (7th Cir. 1978).

² Duplicate bills were introduced on March 17, 1982 (S. 2222 and H.R. 5872), known as the Immigration Reform and Control Act of 1982, which appears to address at least some of these problems.

³ See Comment, *Labor Law—Illegal Aliens are Employees Under 29 U.S.C. § 152(3) (1976) and May Vote in Union Certification Elections*. *NLRB v. Sure-Tan, Inc.*, 583 F.2d 355 (7th Cir. 1978), 10 Rut.-Cam. L.J. 747 (1979).

dressed in *Sure-Tan II*. I do not and need not defend the motives of Sure-Tan management, but even *Apollo Tire Co.*, 604 F.2d at 1183, says an employer should report suspected illegal alien employees to the Immigration and Naturalization Service. The NLRB seems to use only its private knothole to view these issues and sees nothing except its own labor goals. I think this court instead of peering through the NLRB's knothole should look over the fence for a better understanding of the whole problem. If we did, I do not believe that the employers' notification to the Immigration and Naturalization Service would be construed as a "constructive discharge" so as to reward the illegal aliens for their illegal labor activities with possible reinstatement and back pay. Reinstatement would no doubt displace American workers at a time when unemployment is already high. Much of the rationale for this seems to be to punish the employer. Punishment of employers of illegal aliens, however, is for Congress, not for us.⁴

Rather than approve the majority's concocted remedy, I would, even if it took some stretching of the doctrine, simply consider this case moot when the illegal aliens "voluntarily" returned to their country. The company's new American workers should be able to decide for themselves what they believe to be in their own best interests. As it is, this court has given proxies to illegal aliens to cast votes for American workers and now has given the illegal aliens some encouragement to come back, displace our own workers and be awarded a back-pay bonus for doing it. At least the view of the majority may serve to inspire Congress to rescue us from this state of things which is of our own judicial doing.

⁴ For a current general discussion of the extent of the problem and pending legislation, see Comment, *Illegal Immigration: Employer Sanctions and Related Proposals*, 19 San Diego L. Rev. 149 (1981).

Therefore, I respectfully dissent from this court's unwillingness to consider this matter *en banc* and to keep us within realistic and sensible judicial bounds.

A true Copy:

Teste:

*Clerk of the United States Court of
Appeals for the Seventh Circuit*

Sure-Tan, Inc. and Surak Leather Co. and Chicago Leather Workers Union, Local 431, United Food and Commercial Workers International Union, AFL-CIO.¹ Cases 13-CA-16117 and 13-CA-16229

December 5, 1979

ORDER DENYING MOTION

On March 6, 1978, the Board issued its Decision and Order in the above-entitled proceeding.² It adopted, *inter alia*, the Administrative Law Judge's finding that Respondent, in retaliation against union activities, constructively discharged five Mexican employees by requesting an Immigration and Naturalization Service investigation that led to the employees' immediate deportation. The Board reversed the Administrative Law Judge as to his recommended remedy for the 8(a)(3) discharges. The Administrative Law Judge assumed that the discriminatees were still in Mexico and thus physically unavailable for work. He therefore refrained from ordering any backpay. He also placed a 6-month time limit on the reinstatement offer. The Board held that the questions of availability and backpay liability should be answered in a compliance proceeding and ordered the conventional remedy.

On September 7, 1978, the General Counsel filed a motion for clarification and the Charging Party answered the motion on October 17, 1978. The General Counsel contends that the Board's Order does not distinguish between legal and illegal immigrant status of discriminatees and thus is contrary to

¹ The name of the Charging Party, formerly Chicago Leather Workers Union Local 431, Amalgamated Meatcutters and Butcher Workmen of North America, AFL-CIO, is amended to reflect the change resulting from the merging of Retail Clerks International Union and Amalgamated Meatcutters and Butcher Workmen of North America on June 7, 1979.

² 234 NLRB 1187 (1978).

national immigration law and policy. The Board's Order is viewed by the General Counsel as encouraging deported discriminatees to return as quickly as possible to claim their jobs and backpay rather than wait until an uncertain date when they might be able to reenter the United States legally.

The General Counsel suggests that our Order be clarified to require an offer of reinstatement only to those discriminatees who are able to reenter the United States lawfully. He argues that backpay should accrue only from the time a lawfully returned discriminatee is denied employment after his return. The General Counsel concedes that this narrow reading of the Board's Order would leave in most deportation cases only the cease-and-desist provisions as a remedy.

The Charging Party responds to the General Counsel by arguing that the effect of the suggested clarification is to allow Respondent to discharge undocumented workers without incurring any backpay obligations. If Respondent is then able to replenish his work force with a new group of illegal aliens, a strong incentive is thus created for illegal migrations.

We have considered both the motion and the answer and we shall deny the motion for the following reasons. The Board is of the view that the remedial policies of the Act will be best effectuated in this case by affording the discriminatees full protection notwithstanding the circumstances attendant to their illegal discharge. They are to be offered unconditional reinstatement. The backpay period runs from the discriminatory loss of employment to the bona fide reinstatement offer. The usual procedures for handling the claims of missing discriminatees are to be used.³ Discriminatees who are located but found to be unavailable for work (including unavailability because of enforced absence from the country) will have their backpay tolled accordingly.⁴ In the event of long delays in

³ Case Handling Manual (Part III), sec. 10584.2.

⁴ *Id.*, sec. 10612-26.

locating the discriminatees, the backpay is to be placed in an escrow account for the normal 2-year period.⁵ As we indicated in our Decision and now reaffirm, the appropriate forum for implementing the Order is in the compliance proceeding. We particularly note that the General Counsel's motion is unaccompanied by any showing of an effort to make the necessary factual determinations as spelled out above.⁶

We do not regard it as within our authority to alter the obligations imposed by the Act in a manner which might assist in reaching whatever may be the current goals of immigration policies, and we would be uncertain how to do so even if we considered it proper.⁷ We reject Member Murphy's suggestion

⁵ *Id.*, sec. 10644.

⁶ It is for this reason that Member Murphy's suggested remedial modifications in the name of "specificity and reasonable accommodation" are premature at best. Similarly, Member Murphy's assertion that the Board's remedy rests on a "fiction" would require for substantiation precisely the factual determinations as to locations and availability that a compliance proceeding would provide.

⁷ *N.L.R.B. v Apollo Tire Co.*, 604 F.2d 1180 (9th Cir. 1979).

The dissents of Members Penello and Murphy fail to take into account the breadth of the court's holding. In agreeing with the Board's position that illegal aliens are employees within the meaning of Sec. 2(3) of the Act, the court enforces our Order for reinstatement and backpay. The court also states that our interpretation best harmonizes with Federal immigration laws in that absent Board jurisdiction employers would be encouraged to hire illegal aliens in order to evade their responsibilities under the National Labor Relations Act. This comports with our reasons for denying the General Counsel's motion in this case. The court refrained from requiring the Board to "delve into immigration matters, out of its field of expertise." We are in complete agreement with the court. Finally, we note that the court made no distinction as to the current lawful or unlawful immigration status of aliens whose

that our expertise is called into question by a failure to appreciate the complexity of the issues. We note that it is Member Murphy who has presented national policy underlying the immigration laws as one-dimensional. She correctly states that competition between illegal aliens and natives for lower paid, lower status jobs often works to depress wages and working conditions. However, it may well be that the result of such competition is not necessarily or always detrimental to native workers. In this regard it has been argued that higher wages in certain industries may act to deprive natives of jobs by either driving the industry out of existence or by compelling major changes in technology.⁸

Southern Steamship Co. v. N.L.R.B.,⁹ cited by our dissenting colleagues, teaches that our responsibility includes an obligation to accommodate the policies of the Act to other Federal statutes expressing equally important congressional objectives. The Court held in *Southern Steamship* that the Board abused its discretion by ordering reinstatement for unfair labor practice strikers whose strike activity violated a Federal anti-mutiny statute. However, in contrast to the facts of this case as developed *supra*, the Court grounded its holding on the judgment that the congressional intent underlying the statute in question was clear and unambiguous and, further, that the strikers' criminal conduct held a serious potential for violence. We are of the view that our Order for reinstatement and a

(Footnote continued from preceding page.)

presence at the time the discrimination occurred was unlawful. Instead, the court affirmed our award of reinstatement to those who were allegedly unlawfully in the country when the discrimination occurred, without regard to whether their presence then or later was unlawful. Thus, Member Penello's distinction on this ground is untenable.

⁸ Piore, "Illegal Immigration in the United States, Some Observations and Policy Suggestions," in "Illegal Aliens, An Assessment of the Issues" National Council on Employment Policy (1976).

⁹ 316 U.S. 31 (1942).

compliance hearing to develop a factual record is not so incompatible with immigration law so as to render it an abuse of our discretionary authority under the rule of *Southern Steamship*. We note particularly that at present there is no showing that any discriminatee has violated any of the criminal provisions of the Immigration and Nationality Act. Further, we are of the view that it is unnecessary at this time to tailor our remedy to the possibility that implementation of our Order would result in such violations. Therefore, at this stage of the proceedings, prior to any factual determinations by the Regional Office, the Board sees no reason to depart from the normal compliance procedures.

It is hereby ordered that the General Counsel's motion be, and it hereby is, denied.

MEMBER PENELLO, dissenting:

I cannot agree with my colleagues' decision to deny the General Counsel's motion for clarification of the Order we entered in this proceeding on March 6, 1978.¹⁰ For I believe that the General Counsel has persuasively demonstrated that important Federal policies require us to clarify our Order to require Respondent to offer reinstatement only to discriminatees lawfully in the United States.

In our Decision and Order, we found that Respondent, in retaliation against the union activities of five of its Mexican employees, requested the Immigration and Naturalization Service to investigate their legal status. As a result, the employees were immediately deported. We concluded that Respondent had constructively discharged the employees in violation of Section 8(a)(3), and we ordered the normal remedy of reinstatement and backpay.

As the General Counsel points out in his motion, the reinstatement and backpay provisions of our Order, as presently

¹⁰ 234 NLRB 1187.

written, do not distinguish between discriminatees who reenter the country lawfully and those who reenter unlawfully. As a consequence, a discriminatee may seek to return immediately to this country, without waiting until he may be able to do so legally, in order to enjoy the benefit of a Board-ordered job waiting for him here. Thus, absent clarification, our Order might encourage a discriminatee to reenter the country illegally—conduct which constitutes a felony under United States criminal laws.¹¹

In view of the foregoing, I believe that it is incumbent upon us to harmonize the policies of our Act with those of the Federal immigration laws.¹² I would therefore clarify our Order so as to require Respondent to offer reinstatement only to discriminatees lawfully in the country.¹³

¹¹ 8 U.S.C. secs. 1325, 1326.

¹² See *Southern Steamship Company v. N.L.R.B.*, 316 U.S. 31 (1942).

In *N.L.R.B. v. Sure-Tan, Inc. and Surak Leather Company*, 583 F.2d 355 (1978), where the Seventh Circuit enforced the bargaining order we entered against the same Respondent involved in the instant proceeding, the court found that the Board's Order was "not inconsistent with federal immigration laws." The court said that "here the lasting benefit goes not to the law violators—the aliens—but rather to the Union, which is not accused of wrongdoing." *Id.* at 360, 361. The court expressly stated that issues of reinstatement and backpay were not before it. *Id.* at 358, fn. 3.

The majority's reliance on *N.L.R.B. v. Appollo Tire Co., Inc.*, 604 F.2d 1180 (9th Cir. 1979), is misplaced. The issue raised by the instant case was not before the Ninth Circuit in *Appollo Tire* because as the Board stated in its brief to the court, "The Company here has not contended that the employees here involved have been deported."

¹³ Notwithstanding this clarification, the "cease and desist" aspect of our Order would remain intact and thus Respondent would be barred from repeating its discriminatory counsel if a court of appeals enforced our 8(a)(3) finding Respondent would be subject to contempt sanctions should it again resort to the tactics it employed here.

MEMBER MURPHY, dissenting:

In its Decision and Order of March 6, 1978,¹⁴ the Board found that Respondent violated Section 8(a)(3) of the Act by constructively discharging five Mexican employees, who were illegal aliens, in retaliation for their union activities, and ordered reinstatement and backpay for those employees, giving the usual remedy for such violations. The constructive discharge of the five illegal aliens was the consequence of Respondent's request to the Immigration and Naturalization Service to investigate, which Respondent knew would result (as it did) in their deportation. Obvious problems of compliance therefore exist concerning availability of the deported employees.

The General Counsel's motion for clarification requests that the Board specify what Respondent's obligations are under the Order herein so that the compliance proceeding may deal with the question of whether Respondent has satisfied its obligations.

The General Counsel asserts that the intent of the Board's remedial order is unclear, that Respondent has legitimate questions concerning how or when it is required to reinstate and give backpay to the discriminatees, and that a circuit court on review may well have similar questions. The General Counsel states that the Order as issued requires reinstatement and backpay without regard to illegal alien status and that implementation of the Order would be contrary to national immigration policies and laws. Therefore, the General Counsel has suggested various alternative remedies which he believes would discourage Respondent from violating the Act but would not be in conflict with the Immigration and Nationality Act.

The majority of the Board is denying the General Counsel's motion because they "do not regard it as within our authority to alter the obligations imposed by the Act in a

¹⁴ 234 NLRB 1187.

manner which might assist in reaching whatever may be the current goals of immigration policies. . . ."¹⁵ They therefore interpret the existing remedial order as requiring the unconditional offer of reinstatement for the illegal aliens with backpay from the date of discharge to the date of a "*bona fide* reinstatement offer." I disagree.

The Board majority also states that while backpay will be tolled where employees are unavailable for work—including unavailability of illegal aliens who are not allowed to return to this country—its citation in footnote 3 to the Board's Casehandling Manual requires that Respondent's *obligation to the illegal aliens continues indefinitely* and if at any time any of the five employees again becomes available an offer of reinstatement must be made. Further, where discriminatees cannot be located, backpay is to be placed in escrow for a 2-year period.¹⁶

There is no doubt that the Board's Order in this case must be clarified. The uncertainties which Respondent has expressed

¹⁵ *N.L.R.B. v. Apollo Tire Co., Inc.*, 604 F.2d 1180 (9th Cir. 1979), cited by the majority for this proposition, did not involve illegal aliens who had been deported and hence is inapplicable to the facts herein. The majority claims that distinguishing *Apollo Tire* on these grounds "fails to take into account the breadth of the court's holding" the rationale for which the majority implies is applicable to all situations in which a Board Order comes into conflict with existing immigration laws. This is a very uncertain conclusion and one which goes beyond the issue before the court in that case and hence must go beyond the intent of the court; it is indeed a peculiar logic to apply *Apollo Tire* to the current proceeding simply because the court in reaching its conclusions failed to differentiate between illegal aliens situated in this country and those who were deported especially when the facts presented to the court did not involve individuals in the latter category.

¹⁶ Member Penello dissents; he would grant the General Counsel's motion including a requirement that Respondent be required to offer reinstatement "only to discriminatees *lawfully* in the country." (Emphasis supplied.)

are very real. The majority's action in purporting to leave future determination to the compliance stage of the proceeding begs the question—neither Respondent nor the General Counsel knows what is required in order to comply with the Order here unless the Board informs them. To this extent I would grant the General Counsel's motion.

The majority's refusal to consider how the enforcement of the National Labor Relations Act (NLRA) may be effectuated in such a way as to fit in with the implementation of the current goals of immigration policies manifests an overwhelming indifference and insensitivity to other Federal law, either alone or as it may impact on the current labor and economic situation in this country. However, nothing in the NLRA or its policies gives the Board a special dispensation to ignore other legislation. Of course, the Board may not interpret other statutes and is not empowered to enforce any other legislation unless directed to do so by Congress.¹⁷ We have not been so empowered as regards the Immigration and Nationality Act (INA), but it is incumbent upon us to take cognizance of other statutes and accommodate to them if we can. It is possible to do so here and I deem it essential in light of the common purpose of protecting employees.

Thus, the legislative purpose of the INA provisions which relate to illegal aliens is to prevent such aliens from entering this country to perform labor "because of the likely harmful impact of their admission on American workers."¹⁸ Congress

¹⁷ See my dissenting opinions in *Westinghouse Electric Corporation*, 239 NLRB 106 (1978); *The East Dayton Tool and Die Co.*, 239 NLRB 141 (1978); *Safeway Stores, Incorporated*, 240 NLRB 836 (1979); *Automations & Measurement Division, The Bendix Corporation* 242 NLRB 62 (1979). *The Bendix Corporation*, 242 NLRB 1005 (1979); *Markle Manufacturing Company of San Antonio*, 239 NLRB 1353 (1979); *Kentile Floors, Inc.*, 242 NLRB 755 (1979).

¹⁸ *Richard B. Peskiff v. Secretary of Labor*, 501 F.2d 757, 761 (D.C. Cir. 1974). cert. denied 419 U.S. 1038 (1975).

noted that this impact principally affects the lower paid, lower status jobs held by the young, blacks, and members of other minority groups who experience the highest unemployment rates and who can least afford such competition.¹⁹ It is clear from this that although illegal aliens are clearly employees within the meaning of the Act and are entitled to its protection²⁰ this does not make them immune from the provisions of INA. Under these circumstances, for the Board to let this Order stand and leave for determination in compliance what action is needed would be to require the courts to do what the Board should be doing—reconciling the provisions and policies of the NLRA with those of the INA.²¹

Clearly we cannot allow the present Order of reinstatement of illegal aliens to remain in effect.²² The remedy in this case is merely another situation in which the Board is indulging in the fiction that the discriminatees did not leave the labor market and are available for work despite the fact they are not in truth available at all. For they have been deported to Mexico and are very unlikely to return to this country *legally* in the foreseeable future. Similarly, in *M Restaurants, Incorporated*,

¹⁹ House Committee on the Judiciary, *Illegal Aliens; Analysis and Background* 93d Cong. 1st sess., 18 (1977).

²⁰ *Amay's Bakery & Noodle Co.*, 227 NLRB 214 (1976).

²¹ See *Southern Steamship Co. v. N.L.R.B.*, 316 U.S. 31 (1942), in which the Supreme Court affirmed the Board's unfair labor practice findings but would not enforce the remedy, finding it to be in conflict with another Federal law. Compare *Stein Printing Company*, 204 NLRB 17 (1973), and *Emerald Maintenance, Inc.*, 188 NLRB 876 (1971), in which the Board tailored its remedies to accommodate applicable state and Federal law.

²² I disagree with the majority in holding that its Order for reinstatement would not be an abuse of the Board's discretionary power under the rule of *Southern Steamship*, *supra*. This Order would encourage deported discriminatees to return to this country by means outside the procedures of the INA, a result clearly in conflict with provisions of that statute.

d/b/a The Mandarin, 238 NLRB 1575 (1978), where the discriminatee had gone to Taiwan—*albeit* voluntarily—the same fiction was adopted despite the fact, as I pointed out in my dissent therein, that the law is clear “that a discriminatee who removes himself or herself from the job market and is not available for work for the employer is not entitled to backpay for such period.”²³ I apply the rationale to illegal aliens.

I believe that a more realistic and practical approach is needed which recognizes the facts and the problems and takes cognizance of the rights of all parties. It is for this reason that I cannot agree with a remedy providing that offers of reinstatement be made only to persons who prove they are legally in this country. I do not believe in the use of internal passports for either citizens or aliens. The requirements of proving legal status is more suited to the ideology of a police state than a democracy. Nor is it within the Board's competence to determine the legal status of aliens. The Ninth Circuit, in discussing the jurisdiction of the Board *vis-a-vis* illegal aliens stated: “[W]e hesitate to require the Board to delve into immigration matters, out of its field of expertise. Questions concerning the status of an alien and the validity of his papers are matters properly before the Immigration and Naturalization Service. An employer who suspects that an employee is in the United States without proper authority should report this information to the INS”²⁴

One possible way to meet the need for specificity and reasonable accommodation would be to limit the backpay period to the time from the date of discharge to the date of deportation, and to provide that the offer of reinstatement be made but that an acceptance thereof be made within a specified

²³ See *Knickerbocker Plastic Co.*, 132 NLRB 1209, 1216 (1961); *Gary Aircraft Corporation*, 210 NLRB 555, 557 (1974).

²⁴ See *N.L.R.B. v. Apollo Tire Co.*, *supra* at 1183.

reasonable period such as 2 weeks; if the employees did not report by the end of that period, the offer would expire.²⁵

As is apparent from this discussion and from the varying views of the Board Members, there are many elements to be considered and reconciled, some of which are outside the expertise of the Board majority.²⁶ This is a situation in which the Board should employ a rulemaking procedure to determine the appropriate remedy in circumstances like these. Affected parties could be heard, disparate elements considered, and a remedy fashioned that would meet not only the demands of this proceeding but could be applied in the future to similar fact situations.²⁷

²⁵ The majority asserts that my suggested "remedial modifications in the name of 'specificity and reasonable accommodation' are premature at best." However, I do what the majority is unwilling to do. Namely, I set out a compliance procedure which recognizes the realities, thereby avoiding the wasted motion of a scenario in which what is sought and what can be had bear little if any relationship to each other. The majority, by indulging in a fiction and extending the fiction into a compliance proceeding, merely defers decision of this inevitable issue and provides guidance for neither Respondent, the General Counsel, nor the general public.

²⁶ My colleagues obviously misconstrue my views as to what removes this matter from the Board's expertise—the complexity of the issues would be unimportant if Congress had delegated that function to this board. Whether the presence of illegal aliens is in fact advantageous to the well-being of our country is a question to be decided by Congress and is not within the purview of the NLRA. Congress has determined that the employment of illegal aliens is detrimental to our Nation's best interests and has authorized, within the provisions of the INA, an immigration procedure which will sustain this policy. Where application of Board law comes into conflict with the intent or the provisions of the INA, then the Board must reconcile the two statutes without intruding into another agency's functions.

²⁷ See S Rept. 95-628, *inter alia*. Labor Reform Act of 1978. 95th Cong. 2d sess., 18 20 (1978), in which the Board is

(Footnote continued on following page.)

I urge my colleagues to recognize the detrimental effect illegal aliens have on our legal work force and to resolve this problem—which is monumental in certain parts of our country—in the due process manner I have set forth herein.

(Footnote continued from preceding page.)

chided for not making more extensive use of its existing rulemaking authority.

UNITED STATES OF AMERICA
Before the National Labor Relations Board

SURE-TAN, INC. AND SURAK
LEATHER COMPANY

CASES 13-CA-16117
13-CA-16229

GENERAL COUNSEL'S MOTION
FOR RECONSIDERATION

JOHN S. IRVING
General Counsel

Washington, D. C.

GENERAL COUNSEL'S MOTION FOR RECONSIDERATION

On March 6, 1978, the Board issued its Decision and Order in this case, finding, *inter alia*, that Respondent had constructively discharged five of its Mexican employees in violation of Section 8(a)(3). The Board found that Respondent, in retaliation against the union activities of these employees, requested an investigation by the Immigration and Naturalization Service (INS), and this investigation resulted in the employees' immediate deportation.

With respect to the remedy for this violation, the Board disagreed with the recommended order of the Administrative Law Judge. The Judge had ruled that the reinstatement order should be held open for a six-month period because "the inability of the discriminatees to return to the United States rendered reinstatement 'at best an unlikely prospect.'" He declined to order backpay because "the deported employees were physically unavailable for work." The Board viewed the Judge's analysis as "unnecessarily speculative," and said that these issues should be decided in a compliance proceeding. It therefore reversed the Judge's failure to grant "the conventional remedy of reinstatement with backpay."

We recognize that certain of the remedial issues in this case may ultimately involve factual matters which are best resolved in a compliance proceeding. However, there are other issues herein which deal with the very meaning of the Board's order, and we believe that these other issues should be decided now. Phrased differently, a compliance proceeding can deal with questions concerning whether a respondent has complied with its obligations under a Board order. However, the order itself should make plain what these obligations are. In the instant case, the Respondent is uncertain as to what its obligations are, and thus has questions concerning what it must do to achieve compliance. We believe that the Respondent's questions are legitimate and that compliance would be aided if the Board

were to clarify the intendment of its remedial order. Further, we believe that a circuit court, which would review the Board's order before any compliance proceeding, may well have similar questions concerning the meaning of the Board's order. Accordingly, we seek clarification of that order.

Respondent contends that the Board order does not require it to offer reinstatement to discriminatees who re-enter the United States unlawfully. Similarly, Respondent argues that backpay should not run during times when the discriminatee is out of the United States and during times when the discriminatee is in the United States but unlawfully so.

Although the Board order, on its face, appears to require reinstatement and backpay without regard to the discriminatee's illegal alien status, we have some question as to whether the Board intended this result. For, as we show below, such a result would be clearly contrary to national immigration policies and laws.

If the Board order is construed to require reinstatement and backpay without regard to status, it would surely encourage a discriminatee to return to the United States, since there would be a Board-ordered job for him here. Similarly, if mere physical presence in this country is sufficient to trigger the running of backpay, the discriminatee would be encouraged to return in order to obtain this benefit. As a practical matter, a discriminatee would be encouraged to return to the United States illegally, so that he could reap these job and monetary benefits as soon as possible, rather than postpone and perhaps give up these benefits entirely by delaying his return until that uncertain day, far in the future, when he *may* be able to enter the United States lawfully.

Thus, the Board's order, so construed, would encourage illegal migration. Because of this, the General Counsel of INS has indicated to us his grave concern about this possible construction of the order. He also advises us that the reentry of

deported individuals constitutes a felony on their part under 8 U.S.C. 1325. In sum, he believes that the Board order, so construed, would encourage migration that is offensive to national immigration policy and in violation of United States criminal laws.

For these reasons, the Board may wish to clarify its order so as to require only that Respondent offer reinstatement to a discriminatee, provided that he reenters the United States lawfully.¹ In our view, the offer should have no time limitation, so that a discriminatee could accept it at any time in the future when he can satisfy the condition. As to backpay, if the offer were sent while the discriminatee was out of the United States and honored when the discriminatee lawfully returned to the United States, no backpay liability would accrue.² If the offer were sent while the discriminatee was out of the United States and then dishonored when the discriminatee lawfully returned to the United States, backpay would accrue from the time that the offer was dishonored. If no offer were sent, backpay would accrue from the time that the discriminatee lawfully reentered the United States.³

¹ It appears that Respondent is ready to make such a conditional offer.

² Since the discriminatees in this case were deported almost immediately after they were apprehended, virtually no backpay accrued at that time. As we understand it from INS officials, this is usually the case. That is, in the typical case, after INS apprehends the person involved, he admits his illegal alien status and he is deported forthwith. If the person does not admit his status, the matter is set for an immediate hearing to determine status. In our view, the backpay in this latter situation would terminate as and when there is an INS finding that the person is an illegal alien or as and when the person does not appear for his hearing.

³ Of course, even if the discriminatee returned to the United States unlawfully, an employer's refusal to employ him on the asserted grounds that he is an illegal alien might

We recognize that this more narrow construction of the Board order diminishes to some extent the effectiveness of the remedial relief. We are advised by INS that, as a practical matter, it is highly unlikely that an illegal alien-discriminatee who has been deported will ever return to this country lawfully in order to take advantage of such a conditional offer of reinstatement.⁴ Moreover, the amount of backpay awarded in most instances will be *de minimus*.⁵ Thus, as a practical matter, there would be neither reinstatement nor backpay for the discriminatee. In view of this, we have considered some counter-arguments which could be made in support of more meaningful relief.

It could be argued, for example, that backpay should run from the time of the constructive discharge until the time when the employee lawfully enters the United States and is reinstated by the Employer. The basis for such a backpay award would be that, but for the Employer's discriminatory action, the employee would not have been deported and would have continued working for the Employer. However, in view of the very slim likelihood that the employee will ever lawfully reenter the United States, the backpay would probably run *ad infinitum* and may therefore be regarded as punitive. A variant of this is that backpay would run from the time of the constructive discharge until the time when INS agents, acting in normal course and without a "tip" from the Employer, would have

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constitute a new violation, if it were shown that the employer had otherwise continued its policy of knowingly hiring illegal aliens and that its asserted grounds for the refusal to hire was a pretext designed to mask an unlawful reason.

⁴ Among the problems that must be surmounted are the existence of Congressionally imposed quotas, the limited number of State Department visas available to aliens from various countries, and the required employment certification of each such alien by the Department of Labor.

⁵ See n. 2 *Supra*.

apprehended these illegal aliens. The basis for such a backpay award would be that, but for the Employer's discriminatory action, the employee would not have been deported until that time. However, the fixing of that point in time would be pure speculation. If the burden were on Respondent to prove when in time that point was reached, the likelihood is that Respondent would be unable to do so, and thus backpay would run *ad infinitum* and would arguably be punitive. Still another possibility would be for the Board to forbid the Employer from knowingly hiring illegal aliens again. Under such an order, the Employer would perforce not be able to repeat the discriminatory acts of the kind involved herein. Further, such an order might have a beneficial impact on those employers who thrive on employing illegal aliens. These employers might be induced to refrain from committing discriminatory acts of the kind involved herein, since to do so would result in their losing the ability to hire illegal aliens. However, such an order would be of no value to the discriminatees in this case. Further, it would involve the Board in policing what is essentially an INS function. Indeed, the Board would be going even further than INS, since at present an employer does not violate federal law by hiring illegal aliens.

In view of the foregoing, we believe that the more narrow construction of the Board's order is appropriate. Although it has remedial deficiencies, the alternatives have grave problems, including the problem of directly offending national immigration policies and laws. Further, the Board order, even as narrowly construed, is not devoid of remedial sanctions. Under the "cease and desist" provisions, the Employer is forbidden from repeating its discriminatory conduct. Thus, assuming court enforcement, the Employer would bear the sanctions of contempt if it responded to future organizational drives as it did here. Such prophylactic relief, coupled with notices to employees, should operate to preclude further misconduct and to inform employees of their Section 7 rights.

Based on the above, we believe that the Board should clarify its order as discussed herein.⁶

Respectfully submitted,

JOHN S. IRVING
John S. Irving
General Counsel

Dated at Washington, DC this
7th day of September 1978

⁶ The Board's decision in *Amay's Bakery & Noodle Co.*, 227 NLRB 214, presents a problem different from the one here. There, the employer argued that reinstatement of illegal aliens would place the employer in violation of state law. The Board demonstrated that this may not be the case. The problem discussed herein is that reinstatement of illegal aliens would be offensive to well defined federal policies and, for the returning discriminatee, offensive to federal criminal law. We submit that the Board should take this into account. See *Southern Steamship Co. v. N.L.R.B.*, 316 U.S. 31 (1942).

On August 25, 1978, the Court of Appeals for the Seventh Circuit enforced the Board's bargaining order which was entered by summary judgement at 231 NLRB No. 32. In doing so, the Court made it clear that it was not considering any reinstatement and backpay issues. See n. 3 of slip opinion. However, the opinion does suggest that the Court might well be disinclined to order reinstatement and backpay for illegal aliens. Thus, it noted that the benefit of the certification and bargaining order involved in that case would extend "not to the law violators—the aliens—but rather to the Union. . . ." Moreover, the Court recognized the need to harmonize the NLRA with immigration policies. Thus, the Court pointed out that the certification and bargaining order "are not inconsistent with federal immigration laws." See p. 7 of slip opinion. Indeed, the Court noted that a refusal to uphold the certification would hinder the effectuation of these laws. See p. 8 of slip opinion.

UNITED STATES OF AMERICA
Before the National Labor Relations Board

SURE-TAN, INC. AND
SURAK LEATHER COMPANY

CASES 13-CA-16117
13-CA-16229

ERRATUM

The Motion that was filed in this matter on September 7, 1978, was inadvertently denominated a "Motion for Reconsideration". As the Motion makes clear, it should have been denominated "Motion for Clarification". Accordingly, where the former phrase appears (cover page, page 1, and Certificate of Service), it should be changed to the latter phrase.

Respectfully submitted,

JOHN S. IRVING
John S. Irving
General Counsel

Dated at Washington, DC this
8th day of September 1978

Sure-Tan, Inc. and Surak Leather Co. and Chicago Leather Workers Union, Local 43L, Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO. Cases 13-CA-16117 and 13-CA-16229

March 6, 1978

DECISION AND ORDER

BY CHAIRMAN FANNING AND MEMBERS JENKINS AND PENELLO

On November 3, 1977, Administrative Law Judge John C. Miller issued the attached Decision in this proceeding. Thereafter, the Respondent filed exceptions. The Charging Party and the General Counsel each filed exceptions with a supporting brief.

Pursuant to the provisions of Section 3(L) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,¹ and conclusions of the Adminis-

¹ The Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an Administrative Law Judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (C.A. 3, 1951). We have carefully examined the record and find no basis for reversing his findings.

The Respondent has also excepted to the Administrative Law Judge's recommendations as to certain issues as prejudicial and showing partiality. After a careful examination of the entire record, the exceptions, briefs, and the Decision of the

(Footnote continued on following page.)

trative Law Judge and to adopt his recommended Order, as modified.

The Administrative Law Judge correctly found that the Respondent committed several violations of Section 8(a)(1) of the Act during the last quarter of 1976 and also violated Section 8(a)(1), (3), and (4) in February 1977 with respect to employee Albert Strong. However, the Administrative Law Judge inadvertently omitted from his recommended Order an appropriate remedy for the unfair labor practices directed against Strong. We will therefore order the Respondent to cease and desist from verbally harassing its employees and from issuing them written reprimands because they attempt to use Board processes or because they support the Union. The Order will also be modified to require the Respondent to expunge the reprimand from Strong's personnel records.

The Administrative Law Judge also found, and we agree, that the Respondent constructively discharged five of its Mexican employees in violation of Section 8(a)(3) of the Act. The Respondent, with full knowledge that the employees in question had no papers or work permits, requested the Immigration and Naturalization Service to investigate their status. This investigation, which resulted in immediate deportation proceedings, was requested solely because the employees supported the Union.

We differ, however, with the Administrative Law Judge as to the appropriate remedy. He began his discussion with the settled proposition that illegal aliens are employees within the meaning of the National Labor Relations Act and are entitled

(Footnote continued from preceding page.)

Administrative Law Judge, we are satisfied that this allegation is without merit. The Administrative Law Judge inadvertently referred twice to the representation election as having been held on December 10, 1977. The correct date was December 10, 1976. The references are in the fourth paragraph of sec. II, B, 1, and in the Conclusions paragraph of sec. II, B, of the Decision.

to its protection.² However, the Administrative Law Judge's recommended Order departs significantly from the conventional remedy for a violation of Section 8(a)(3).

The Administrative Law Judge recommended that a reinstatement order be held open for a 6-month period because he was of the opinion that the inability of the discriminatees to return to the United States rendered reinstatement "at best an unlikely prospect."³ In addition, the Administrative Law Judge declined to order any backpay because of his finding that the deported employees were physically unavailable for work.

The Board is of the view that the Administrative Law Judge's analysis of the remedy was unnecessarily speculative. While it is not disputed that the discriminatees were deported in February 1977, there is no evidence in the record that they have not returned to the United States. The appropriate forum for determining the issues relating to their availability for work is a compliance proceeding.

Based on the foregoing, we find that the Administrative Law Judge erred in failing to grant the conventional remedy of reinstatement with backpay.

² *Amay's Bakery and Noodle Co., Inc.* 227 NLRB 214 (1976).

³ The Administrative Law Judge found that the Respondent's reinstatement offers of March 29, 1977, were deficient for two reasons. First, the time limit given for acceptance, 1 month, was too short in light of the difficulties the discriminatees would face in lawfully reentering the United States. Secondly, since a foreign mail service was involved, there was good reason to question the usual presumption that the offers were ever received. Without passing on these points, we find that the offers were deficient because they were expressly conditioned on the Respondent not being found in violation of United States immigration laws.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Sure-Tan, Inc. and Surak Leather Co., Chicago, Illinois, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Substitute the following for paragraph 1(b) and reletter paragraph 1(b) as 1(c):

"(b) Verbally harassing employees and issuing them written reprimands because of their attempts to obtain Board assistance and because they support the Union."

2. Substitute the following for paragraph 2(a) and reletter remaining paragraphs accordingly:

"(a) Offer Francisco Robles, Ernesto Arreguin, Sacramento Serrano, Arguimino Ruiz, and Juan P. Flores immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make them whole for any loss of earnings, incurred as a result of being constructively discharged on February 18, 1977. Backpay is to be computed in the manner prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950), with interest as prescribed in *Florida Steel Corporation*, 231 NLRB 651 (1977). (See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).)

"(b) Expunge from the personnel record of Albert Strong the letter of reprimand dated February 11, 1977.

"(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment

records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order."

3. Substitute the attached notice for that of the Administrative Law Judge.

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

WE WILL NOT cause the constructive discharge of employees by requesting the Immigration and Naturalization Service to investigate the status of known illegal aliens because of their selection of and support for the Chicago Leather Workers Union, Local 43L, Amalgamated Meat Cutters and Butcher Workmen of North America, AFL—CIO, or any other union, with knowledge that such employees have no papers or work permits.

WE WILL NOT interrogate employees about their union sentiments and sympathies or that of other employees.

WE WILL NOT threaten employees who are illegal aliens with notification of the Immigration and Naturalization Service because of their selection or support of a union.

WE WILL NOT threaten employees with less work if they support the Union.

WE WILL NOT promise employees more work if they do not support the Union.

WE WILL NOT verbally harass employees or issue them written reprimands if they attempt to use the Board's processes or if they support the Union.

WE WILL NOT in any other manner interfere with, restrain, or coerce employees in the exercise of rights protected under the National Labor Relations Act.

WE WILL offer Francisco Robles, Arguimino Ruiz, Juan P. Flores, Ernesto Arreguin, and Sacramento Serrano immediate and full reinstatement to their former jobs or, if these jobs no longer exist, to substantially equivalent positions of employment without prejudice to their seniority or other rights and privileges, and pay them for loss of earnings suffered because of being constructively discharged on February 18, 1977.

WE WILL remove the reprimand of February 11, 1977, from the personnel records of Albert Strong.

SURE-TAN, INC. AND
SURAK LEATHER CO.

DECISION

STATEMENT OF THE CASE

JOHN C. MILLER, Administrative Law Judge: This case was heard in Chicago, Illinois, on August 1 and 2, 1977, on complaints issued on February 22, 1977, and March 23, 1977, alleging that Respondent discriminatorily discharged five employees by questioning the legality of their presence in the United States with the Immigration and Naturalization Service because of the employees' union activities and sympathies and thereby caused their deportation. Respondent is further charged with engaging in various threats and promises to employees in order to discourage employees from engaging in union or protected concerted activities in violation of Section 8(a)(1), (3), and (4) of the National Labor Relations Act, as amended.

Upon the entire record in this case, including my observation of the witnesses and their demeanor, I make the following findings:

FINDINGS OF FACT

I. JURISDICTION

The complaint as amended at the hearing alleges and Respondent admits that Respondent Sure-Tan, Inc., is an Illinois corporation engaged in the business of tanning hides, and that V. J. Surak and S. S. Surak,¹ herein called Surak Leather Co., are co-partners engaged in the purchase and sale of hides.

It is further alleged that Respondent Sure-Tan, Inc., and Respondent Surak Leather Co. (hereafter jointly referred to as Respondent), at all times material herein, are affiliated businesses with common officers, ownerships directors, and operators that constitute a single integrated enterprise; and that said directors and operators formulate and administer a common labor policy for the aforementioned businesses. Despite Respondent's denial that said businesses constitute a single integrated enterprise, the Board specifically found in a prior case, *Sure-Tan, Inc. and Surak Leather Co.*, 231 NLRB 138 (1977), that Respondent was a single enterprise and an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act and such finding was based on the same evidence as was submitted in this proceeding. In view of the Board's prior holding, and the evidence submitted herein, I find and conclude that Respondent is a single integrated enterprise and is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

The complaint alleges, Respondent admits, and I find that the Union, Chicago Leather Workers Union, Local 43L, Amalgamated Meat Cutters and Butcher Workmen of North America, AFL—CIO, is a labor organization within the meaning of Section 2(5) of the Act.

¹ V. J. Surak is generally identified in the record as John Surak. S. S. Surak is Steve Surak for purposes of this proceeding.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background Facts*

It is undisputed that a representation election was held on December 10, 1976, which was won by the Union. Respondent filed objections to the election alleging, *inter alia*, that the Board should not certify a bargaining unit largely composed of aliens illegally in the country or, at the least, whose legal status is questionable. On January 17, 1977, the Acting Regional Director overruled the objections and certified the Union. The Supplemental Decision on objections was received by Respondent on January 19, 1977, and, on the following day, January 20, 1977, Respondent sent the following letter (G.C. Exh. 18) to the Immigration and Naturalization Service:

January 20, 1977

Mr. Robert Esbrook
U. S. Immigration Service
Room 385
219 So. Dearborn
Chicago, Illinois 60604

Dear Sir:

We would like to ask you to check the emigration [sic] status of several [of] our employees, who are Mexican nationals:²

Juan P. Florez, also known as Jose Martinez, Social Security Number 338-50-1497

Francisco Robles, Social Security Number 466-11-2550

Ernesto Arreguin, Social Security Number 357-48-2329

² The letter listed several other Mexican nationals who were not listed as they are not involved in the allegations herein.

Sacramento Serrano, Social Security Number 236-47-5634

Arguimiro Ruiz, Social Security Number 548-06-8995

We appreciate your attention to this request as soon as possible.

Yours very truly,

SURE-TAN, INC.

V. J. Surak

On February 18, 1977, Immigration Service agents visited the premises of Respondent and reviewed the immigration status of the Spanish-speaking employees and, shortly thereafter, those found to be illegally in the country, which included the five alleged discriminatees listed in the above letter, were promptly put aboard a bus and deported to Mexico.

B. Case 13-CA-16117

The substantive allegations of this complaint (par. VI, subpars. (a)—(e) of par. VI), allege essentially that Respondent: threatened employees with less work if they supported the union; promised employees more work if they did not support the Union; interrogated employees about their and their fellow employees' union sympathies and activities; threatened to call the Immigration Service because employees had supported the Union; threatened to discharge employees and close the plant if the Union won the election and promised employees a wage increase if the Union lost the election; threatened to go out of business because the Union won the election.

Francisco Robles, an employee and admitted illegal alien, credibly testified that in October, 1976, prior to a representation election held on December 10, 1976, John Surak approached him at his workplace and showed him a piece of paper with squares marked yes and no. Pointing to where the yes

appeared Surak stated "Union no good. Little work." Surak then pointed to where the no square appeared and stated "the company is good. A lot of work there." Surak then made a cross where the no appeared and said, "OK Francisco," and Robles replied, "OK."

Robles further testified credibly that approximately a week before the scheduled representation election of December 10, 1976, Surak approached employee Primitivo Servantez who was working with Robles and attempted to give him similar advice about voting no union. After receiving no answer Surak came to Robles and told him to tell Primitivo in Spanish. Robles then told Primitivo the same thing Robles had previously been told, namely, that in voting as to the Union the yes square was "no good, little work" and that the no square "is good, a lot of work." Robles further related that he told Primitivo that John (Surak) wanted him to put a cross on the square with the word "no."

Robles also testified credibly that, an hour or two after the election in which the Union was selected, John Surak approached him and employees Ruiz and Primitivo and said, "no friends, no amigos," said "sons of a bitches" and used the word "immigration." Surak then stated "Union, why?" and then said "Mexican son of a bitch." Surak then asked Robles if he had immigration papers and Robles answered no. Then Surak asked if the others had papers and Robles responded he did not know. Primitivo then told Robles to tell Surak that nobody had papers there and Robles conveyed that information to John Surak.

Floriberto Rodriguez, an employee of Sure-Tan from March through October 28, 1976, credibly testified that, in August 1976, John Surak approached him and a group of fellow employees and in half-English and half-Spanish asked several times of the group, "you all union?" Rodriguez responded on behalf of the group that he did not know anything about the Union, whereupon Surak said, "You are all son of a

bitches," and left. Rodriguez further testified that he attended a National Labor Relations Board hearing in October 1976 and that, subsequent to that hearing, John Surak was helping him put some chemicals in a container and Surak told him that he was stupid and that he and the Union were sons of bitches. Whereupon, Rodriguez said he did not want to work for Surak anymore and asked for and received his check and left the job. Rodriguez's resignation from the job as well as the October incident are not alleged to be violations and that testimony was admitted as background evidence of union animus.

1. The affidavits of deported aliens

Introduced and accepted into evidence were the affidavits of three alleged discriminatees, Aguimino Ruiz, Ernesto Arreguin, and Sacramento Serrano. They were deported from the country on or about February 18, 1977, to their native country, Mexico, because they were found by the Immigration and Naturalization Service to be in the country illegally. They were unavailable to testify for this hearing despite efforts to locate them and have them return to testify. Counsel for the General Counsel, William Kocol, stated that the affidavits were made before him and a Spanish-speaking interpreter; that, because of their prompt deportation, there was an insufficient time to procure depositions which would have afforded Respondent's counsel opportunity to cross-examine; and, lastly, that Respondent's objection to the introduction and consideration of these affidavits for this case has no merit because it was Respondent's action in writing the Immigration Service that led to their deportation and consequent unavailability for this hearing. Respondent's objection to the admissibility of the affidavits centers largely on the inability to cross-examine the individuals concerned and states that deportation of such individuals was by the Government, and specifically by the Immigration and Naturalization Service, because they were in the country illegally.

It is clear that Respondent through its principal agent, John Surak, was aware that most of his employees were illegal aliens³ and, in fact, objected to a representation election because of that fact. The day following the receipt of a supplemental report on objections issued by the Regional Director for Region 13 which report overruled Respondent's objections to the election, John Surak wrote the Immigration Service asking that an investigation be made of the legality of the status of certain of his employees. It is clear and I find that Respondent's request to the Immigration Service was prompted by his employees' selection of a union as their bargaining representative and that Respondent's action resulted in the deportation of the five named discriminatees involved in this case.

Nonetheless, I note that Francisco Robles was located and testified in this hearing despite his deportation. This gives support to the view that the individual discriminatees may have personally decided not to return for this hearing. Secondly, while the request from Respondent was the proximate cause of their deportation, it was the Immigration Service that determined they were here illegally and who did the actual deportation. Thirdly, the affidavits are clearly hearsay and do not give Respondent the opportunity to cross-examine the individuals, normally a procedural prerequisite to use as evidentiary material. Lastly, the affidavits of both Ruiz and Arreguin⁴ merely

³ In addition to the objections to the election on the basis the employees were illegal aliens, subsequent to the election of December 10, 1976, V. J. (John) Surak, on January 10, 1977, executed an affidavit (G.C. Exh. 32) in which he stated that a couple of months before the election he was told by a confidential source that these men (the employees) were here illegally. Further, the statement acknowledged that, a week or so after the election, John Surak asked employees if they had a "green card" and each of the employees told him no. John Surak's contrary testimony, which he later modified, is not credited.

⁴ G.C. Exhs. 19 and 30. The affidavit of Serrano is G.C. Exh. 31.

recounts incidents of interrogation or instructions to vote no in the election, both matters which would be merely cumulative in light of credited testimony of Robles and Rodriquez to the same effect. The affidavit of Serrano does relate explicit threats of discharge if the employees voted for the Union and a promise of a 20-cent-wage increase if the Union were not voted in. Nonetheless, such explicit threats would be remedied by the order herein since they fall within the general category of threats for supporting the Union or promises of benefit if the Union is not supported. Accordingly, for all of the above reasons, I conclude that use of the affidavits of Ruiz, Arreguin, and Serrano as evidentiary material is questionable at best and unnecessary, in any event, to remedy the substance of the allegations of the complaint. Accordingly, in making my findings herein, I do not rely on such affidavits.

Albert Strong, another employee of Sure-Tan, credibly testified that shortly after the election results were known on December 10, 1977, John Surak came to him and said, "Your dream finally come true ... but I won't stay in business." Strong merely responded "OK."

John Surak was hesitant, unimpressive, and at times evasive in his denials of any statements by him to employees involving interrogation of his employees and threats and promises of benefit if they voted no union in the representation election. Accordingly, I do not credit such denials, nor any of his testimony which is contrary to that which I have credited.

Conclusions

In view of the credited testimony, I find that Respondent, through its supervisor and agent, John Surak, violated Section 8(a)(1) of the Act by: (a) threatening employees, in October 1976, with less work if they supported the Union and promising employees more work if they did not support the Union; (b) interrogating employees, in October and December 1976, about

their union sentiments and views and the union sentiments and activities of other employees; (c) threatening to notify the Immigration Service by asking employees shortly after the representation election on December 10, 1977, if they had papers or "green cards" and mentioning "immigration" thus constituting a thinly veiled threat to notify the Immigration Service because they had supported the Union; (d) on or about December 10, 1976, threatening to go out of business because the Union won the election.

C. Case 13-CA-16229

The complaint in this case alleged that Respondent caused the discharge of five employees by writing the Immigration and Naturalization Service and asking them to check their status which resulted in their deportation and that such action was motivated by the employees' support for the Union. The complaint further alleges that Respondent, through its agent John Surak, threatened and harassed and subjected to verbal abuse an employee (Albert Strong) on February 4, 9, and 11, 1977, including a written warning letter because the employee had engaged in union and/or protected concerted activities or because the employee was named in a charge filed under the Act and/or because such employee had given testimony to the National Labor Relations Board.

In view of the 8(a)(1) violations I have previously found in Case 13-CA-16117, and General Counsel's Exhibit 18, the letter dated January 20, 1977, from Respondent to the Immigration Service, the text of which was cited previously, I find and conclude that Respondent's request to investigate the immigration status of its employees was motivated by its employees' support of the Union. I further conclude that the discriminatees' subsequent deportation was the proximate result of the discriminatorily motivated action by Respondent and constitutes a constructive discharge violative of Section 8(a)(3)

and (1) of the Act.⁵ This finding is buttressed by the testimony of Edward Malin, a criminal investigator employed by the U.S. Immigration Service who credibly testified that the Immigration Service visited the Sure-Tan facilities on February 18, 1977, as a direct result of the letter received by the Immigration Service and identified General Counsel's Exhibit 18 as the "report that precipitated the visit to the Sure-Tan Company on the date of [in] question." Accordingly, I find that, but for Respondent's letter to Immigration, the discriminatees would have continued to work indefinitely for Respondent.

Additional 8(a)(1), (3), and (4) Allegations

Employee Albert Strong credibly testified that on or about January 31, 1977, he went to the Board Office and made a

⁵ See *Amay's Bakery & Noodle Co., Inc.*, 227 NLRB 214 (1976). While I recognize that, in *Amay's*, the employer terminated the employees whereas, in the present case, the removal and deportation of employees was done by the Immigration Service which resulted in their *de facto* termination, the distinction does not affect my finding that Respondent's actions here resulted in the employees' constructive discharge, in violation of Sec. 8(a)(3) and (1) of the Act. In view of Respondent's knowledge that none of its employees had "papers" or work permits, its request to Immigration Service to investigate named employees would inevitably result in their deportation. Inasmuch as the request was motivated by the employees' selection and support of the Union, and Respondent is responsible for the foreseeable result of its action, their deportation is held to be a constructive discharge violative of Sec. 8(a)(3) and (1) of the Act. It should be emphasized, however, that the finding herein *does not* foreclose an employer from making a similar request where its request is not motivated by their employees' union activities or protected concerted activities. Cf. *Bloom/Art Textiles, Inc.*, 225 NLRB 766, 769 (1976).

No issue has been raised herein as to the applicability of a state statute governing the employment of illegal aliens. Cf. *Amay's Bakery*, *supra* at 217.

complaint about his being laid off. Shortly, thereafter, on or about February 4, 1977, John Surak approached him and berated him because he "filed a complaint about the layoff when you asked to be laid off." Surak then called him a "dirty son of a bitch." Sometime later John's brother, Steve Surak, called him a dirty son of a bitch stating, "You are trying to get money like you did before."⁶ Strong also testified as to two incidents occurring on February 9 and 11, which are also alleged to be harassment. The February 9 incident concerned a minor dispute about the leather splitting machine where Strong attempted to show John Surak that the machine was malfunctioning and John took the material away from Strong stating, "If you ain't gonna do it, I'll get somebody else to do it." As to the February 11 incident, John Surak allegedly called him "a lazy punk" for failing to bring up a certain number of bags of chemicals. Later, as Strong was leaving work on February 11, he received a letter of reprimand (G.C. Exh. 27). Strong, an employee of some 11 years, further credibly testified that, prior to the union election on December 10, 1976, he had never received a letter of reprimand.

I find that Strong, a reinstated discriminatee from a previous case involving this employer, was upbraided on February 4, for filing a "complaint" with the Board about his layoff. While I find that the incidents that occurred on February 9 and 11 were rather trivial altercations which occur on a worksite and do not of themselves establish that Strong was being harassed because of his union sympathies, I do conclude that the letter of reprimand was an overreaction to relatively minor work disputes and was motivated by Strong's attempted utilization of Board processes and his support of the Union. I conclude and find, therefore, that the verbal harassment of February 4 and the written reprimand of February 11

⁶ Referring to an earlier case involving Respondent's predecessor, *S. S. Surak and J. V. Surak d/b/a National Rawhide Manufacturing Co.*, 202 NLRB 893 (1973).

were motivated by Strong's attempted use of Board processes and his longstanding support for a union and such incidents are violative of Section 8(a)(1), (3), and (4) of the Act.⁷

CONCLUSIONS OF LAW (CASES 13-CA-16117
AND 13-CA-16229)

1. By requesting the Immigration and Naturalization Service to investigate the legal status of their Mexican national employees because of their support for the Union, with full knowledge that such employees had no papers or work permits, the Respondent caused the deportation of employees Francisco Robles, Sacramento Serrano, Juan P. Flores, Ernesto Arreguin, and Aguimino Ruiz, thereby constructively discharging them in violation of Section 8(a)(3) and (1) of the Act.

2. By questioning employees shortly after the representation election of December 10, 1976, in which the Union was selected as bargaining representative, if they had "papers" or "green cards" and mentioning immigration, Respondent engaged in a thinly veiled threat to notify the Immigration Service because they had supported the Union, and such conduct is violative of Section 8(a)(1) of the Act.

3. By interrogating employees in October and December 1976 about their union sentiments and the union sentiments and activities of other employees, Respondent, through its agent and supervisor, John Surak, violated Section 8(a)(1) of the Act.

4. By threatening employees in October 1976 with less work if they supported the Union and by threatening to go out of business on or about December 10 1976, because the Union won the election, the Respondent, through its agents and

⁷ *Disposal Service, Inc.*, 226 NLRB 1310 (1976); *Lenox Hill Hospital*, 225 NLRB 1237 (1976).

supervisor, John Surak, engaged in conduct violative of Section 8(a)(1) of the Act.

5. By promising employees more work in October 1976 if they did not support the Union, Respondent engaged in conduct violative of Section 8(a)(1) of the Act.

6. By verbally harassing employee Albert Strong, on or about February 4, 1977, and by issuing a written reprimand to Albert Strong on or about February 11, 1977, because of his attempted use of Board processes and because of his longstanding support for a union, Respondent has engaged in conduct violative of Section 8(a)(1), (3), and (4) of the Act.

7. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Because the discriminatees were promptly deported to Mexico on or about Friday, February 18, 1977, because they were admittedly illegal aliens, the conventional remedy of backpay and reinstatement appears inadequate since being physically unavailable for employment nullifies any backpay liability and their inability to return to the United States renders reinstatement at best an unlikely prospect.

Counsel for the General Counsel stated at the hearing that the question of remedy was under advisement and, in their subsequent brief, merely requested the traditional remedy of backpay and reinstatement without any explanation as to how and under what theory backpay or reinstatement can be ordered in these circumstances.

Counsel for the Charging Party argues that, if the Respondent is not to benefit from its illegal conduct, the Respondent must be required to make a good-faith effort through U.S. Government channels to secure the aliens' return to the United

States and that Respondent's backpay obligation must continue to run until such discriminatees return to the United States and are offered proper reinstatement, or the proper Government agent rules that the employees cannot return to the United States, or the employee elects not to return to the United States. The Charging Party's requested remedy is unrealistic in that it requires the Employer to work for correction of the illegal status of aliens when he was not responsible for such status or for their being in the country. The request for backpay indefinitely is excessive and perhaps punitive in view of their unavailability for work. Lastly, there already has been a valid determination that these employees were illegal aliens.

I start with the basic premise that illegal aliens are employees within the meaning of the National Labor Relations Act and are entitled to the protection of the Act, including such conventional remedies as reinstatement and backpay.⁸ Upon careful consideration and for the reasons noted hereafter, I recommend that a reinstatement order be expanded to a 6-month period. In view of my interpretation of prior Board precedent, my recommended Order will not grant backpay but will suggest that the Board consider awarding limited backpay in order to best effectuate the purposes of the Act.

I have considered whether to recommend that Respondent's hiring processes be monitored to prevent similar violations but, absent evidence that this Respondent is a repeat offender as to this type of violation, such extraordinary remedy seems unwarranted at this time. In any event, if the Respondent ultimately violates a court enforced Board Order, contempt action may be initiated.

With respect to reinstatement, I recommend that an additional 6-month period be granted from the date of this Decision (or the Decision of the Board if appealed) to afford these aliens ample opportunity to return legally and accept reinstatement if

⁸ *Amay's Bakery & Noodle Co., Inc.*, *supra*

they desire. I note that Respondent's letter offer of reinstatement dated March 29, 1977, gave employees until May 1, 1977, to accept reemployment. Even assuming delivery of such letters in Mexico by April 10, 1977, this would afford employees 20 days or less to initiate procedures to re-enter the United States on work permits or other valid basis. Lastly, and perhaps more importantly, since the mail was not sent registered or certified mail and without return receipts, there is no evidence that the discriminatees ever received the offers of reinstatement. Accordingly, I recommend that further offers of reinstatement be made and that they be kept open for a 6-month period, and that, to the extent possible, receipt of such offers be verified. While I am cognizant that, even with this modification, reinstatement is still a dim prospect, a more reasonable time basis is necessary to make the reinstatement offer a more realistic and viable remedy.

With respect to a possible backpay recommendation, I am bound by past Board precedent which tolls backpay where an employee is not available because of illness,⁹ because he has moved from the area, is no longer in the labor market,¹⁰ is incarcerated,¹¹ or is in the Armed Forces.¹² I have been unable to find any precedent that would warrant the award of backpay in this case. Nonetheless, because the discriminatees were deported as a proximate result of Respondent's letter to the Immigration Service, failure to award any backpay results in the Respondent benefiting from its own unfair labor practice.

⁹ *Park Edge Sheridan Meats, Inc.*, 139 NLRB 748, 750 (1962).

¹⁰ See *Rice Lake Creamery Company*, 151 NLRB 1113, 1115, fn. 10 (1965), dissenting viewpoint affd. 365 F.2d 888, 891 (1966).

¹¹ *Gifford-Hill & Co., Inc.* 188 NLRB 337, 338 (1971); *MSW Construction, Inc. d/b/a Hale & Sons Construction*, 219 NLRB 1073, 1079 (1975).

¹² *John David Brock, d/b/a J. D. Brock et al.*, 42 NLRB 457, 468-469 (1942).

Accordingly, the Board is invited to consider awarding backpay for at least a minimum period of 30 days (or 4 weeks) or alternatively, backpay ending 12 days after the letter of reinstatement was mailed, namely, April 10, 1977, as an exception to its normal rule for the following reasons: (1) Respondent's conduct, a violation of our Act *in this context*, caused the employees' unavailability; (2) while an employer may have the duty or even an obligation to request an investigation of his employees' alien status in ordinary circumstances, the Respondent did so here *only* when the Union successfully got the support of the employees; (3) without an award of some backpay, the violations herein will largely go unremedied and the Employer may be encouraged to adopt an apparently foolproof system of defeating union organizational attempts. Consequently, some backpay award can act as a deterrent to similar future violations; (4) a limited award of backpay will remedy the violations of our Act while given proper recognition and accommodation to the Federal statute on aliens.¹³ In effect, therefore, a limited backpay award will act to remedy in part the violations of our Act while giving recognition to the fact that such employees were illegally in the country and in light of their unavailability should not be entitled to an indefinite backpay award. Thus, the Board is invited for any or all of the above reasons to consider making some backpay award. Constrained as I am by Board precedent, the Order herein will provide no backpay.

Upon the basis of the foregoing findings of fact, conclusions of law, and the entire record in this proceeding, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

¹³ 8 U.S.C. Sec. 1101, *et seq.* (NA).

ORDER¹⁴

The Respondent, Sure-Tan, Inc., and Surak Leather Co., Chicago, Illinois, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership in, support for, or activities on behalf of Chicago Leather Workers Union, Local 43L, Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, by: threatening to notify the Immigration Service because of employees' support for the Union; notifying the Immigration Service and requesting a check on their status because of their support for the Union and thereby resulting in their deportation from the country and their constructive discharge; interrogating employees about their union sentiments and sympathies and that of their fellow employees; threatening employees with less work if they supported the Union; promising employees more work if they did not support the Union.

(b) In any other manner interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Offer to Francisco Robles, Ernesto Arreguin, Sacramento Serrano, Arguimino Ruiz, and Juan P. Flores reinstatement to their former jobs and, if those jobs are not available, comparable jobs. If such offer is made in writing, evidence of receipt of such offer

¹⁴ In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

should be submitted in view of the fact that the discriminatees' last known addresses are in Mexico. Offers of reinstatement shall be held open for a period of not less than 6 months from the date of issuance of this Decision, or, if such decision is appealed to the Board, such offer shall be held open for 6 months from the date of issuance of the Board's Decision or court enforcement of that Decision, whichever is applicable. Since the above employees were not available for employment there is no backpay award absent a Board modification of this recommended Order.

(b) Post at its premises in Chicago, Illinois, copies of attached notice marked "Appendix."¹⁵ Copies of said notice shall be in English and Spanish, on forms provided by the Regional Director for Region 13 and, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material. In addition, Respondent will mail a copy of such notice to the discriminatees at their last known address.

(c) Notify the Regional Director for Region 13, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

IT IS FURTHER RECOMMENDED that the complaint be dismissed insofar as it alleges unfair labor practices not found herein.

¹⁵ In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

No. 82-945

Office-Supreme Court, U.S.

FILED

FEB 16 1983

ALEXANDER L. STEVAS,
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1982

SURE-TAN, INC. AND SURAK LEATHER COMPANY,
PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD
IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether an employer constructively discharged employees known to be illegal aliens by reporting the employees to the Immigration and Naturalization Service, resulting in their arrest and immediate departure from the United States.

2. Whether the remedial order in this case is appropriate.

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THE SEVENTH CIRCUIT*

**BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD
IN OPPOSITION**

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-24a) is reported at 672 F.2d 592. The decision and orders of the National Labor Relations Board (Pet. 61a-83a, 40a-52a) are reported at 234 N.L.R.B. 1187 and 246 N.L.R.B. 788.

JURISDICTION

A petition for rehearing with suggestion for rehearing en banc was denied on May 5, 1982 (Pet. App. 36a-39a), and the judgment of the court of appeals was entered on July 12, 1982 (Pet. App. 25a-33a). On September 17, 1982, Justice Stevens extended the time within which to file a petition for a writ of certiorari to and including December 6, 1982, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

Relevant provisions of the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, are set forth at Pet. 3.

STATEMENT

1. Petitioners Sure-Tan, Inc. and Sarak Leather Company are leather processing firms located in Chicago, Illinois.¹ At the time in question, petitioners employed about 11 workers, most of whom were Mexican nationals who were in the United States without visas or working permits. In July 1976, the Chicago Leather Workers Union, Local 431, Amalgamated Meatcutters and Butcher Workmen of North America began to organize the Company's employees. The union election petition led to a union victory in a December 10, 1976 Board election. On January 19, 1977, the Board notified petitioners of the union's certification as the employees' collective bargaining representative. (Pet. App. 2a).²

The day after receiving notice of the union's certification, petitioners wrote the Immigration and Naturalization Service suggesting that INS should check the status of several of petitioners' Mexican employees (Pet. App. 8a-9a, 68a-69a). On February 18, 1977, INS agents visited the Company's plants, discovered that five employees were in the United States illegally, and had them arrested and removed from the premises (Pet. App. 9a, 69a).³ Each of the five employees executed INS Form I-274, acknowledging that

¹For purposes of the National Labor Relations Act, petitioners are a single, integrated employer (Pet. App. 67a).

²Petitioners' refusal to bargain with the union was found to be an unfair labor practice in a prior proceeding. 583 F.2d 355 (7th Cir. 1978).

³The five employees are Juan P. Florez, Francisco Robles, Ernesto Arreguin, Sacramento Serrano, and Arguimiro Ruiz (Pet. App. 9a, 68a-69a).

he was a Mexican citizen illegally present in this country (Pet. App. 9a). By executing this form, the employees accepted INS' grant of voluntary departure in lieu of deportation (Pet. App. 9a-10a). By the end of the day (February 18), the five employees had been placed on a bus bound for El Paso, Texas (Pet. App. 11a, 69a), and from there they were to return to Mexico. On March 29, 1977, petitioners sent letters in English by regular mail to the five employees at their last known address in Mexico. Petitioners offered to reinstate the employees, provided that doing so would "not subject Sure-Tan, Inc. to any violations of United States immigration laws." The offer remained open until May 1, 1977. There was no evidence that any of the letters were received. (Pet. App. 20a, 80a.)

2. Adopting the findings of the administrative law judge, the Board found that petitioners had violated Section 8(a)(1) and (3) of the National Labor Relations Act, 29 U.S.C. 158(a)(1) and (3), by requesting the INS investigation and thereby forcing the departure of the five employees *solely* because they supported the union.⁴ The Board held that aliens are employees under Section 2(3), 29 U.S.C. 152(3), and therefore are entitled to the protection of the Act (Pet. App. 62a-63a, 74a-75a). The Board also found that the requisite factual elements of a "constructive" discharge were present: (1) the employees' forced departure was the proximate result of petitioners' request for an INS investigation, and (2) petitioners' request, made with knowledge of both the employees' immigration status and

⁴The Board also found that petitioners' repeated threats, interrogations and other coercive statements during the union organizing campaign violated Section 8(a)(1) of the Act, 29 U.S.C. 158(a)(1) (Pet. App. 61a-62a, 73a-74a) and that their harassment and reprimand of Albert Strong, another of petitioners' employees, violated Section 8(a)(1), (3) and (4) of the Act, 29 U.S.C. 158(a)(1), (3) and (4) (Pet. App. 61a-62a, 75a-77a). No issue concerning these findings is raised in this Court.

the union's recent certification, and against the backdrop of petitioners' Section 8(a)(1) conduct, was motivated by anti-union considerations (Pet. App. 62a, 74a-75a).

The Board concluded that petitioners' post-discharge letter offering each discriminatee "full and complete reinstatement to [his] former job, provided only that [his] re-employment shall not subject Sure-Tan, Inc. to any violations of United States immigration laws" was not an unconditional reinstatement offer (Pet. App. 20a n.3).⁵ To remedy the unlawful constructive discharge of the five undocumented aliens, the Board entered a reinstatement and backpay order (Pet. App. 63a-64a).⁶

Later, over the dissent of two Members, the Board denied the General Counsel's motion to "clarify" its order to limit any offer of reinstatement to discriminatees who lawfully re-entered the country and to limit backpay to periods of lawful presence (Pet. App. 54a-60a). The Board explained that "the backpay period runs from the discriminatory loss of employment to the bona fide reinstatement offer," that

⁵The administrative law judge had found the March 29 offer deficient on grounds that the time limit for acceptance was too short (a six-month period was recommended) and that, given the manner of delivery, there was some question whether the letters were received (Pet. App. 79a-80a). The Board noted but did not pass on these points (Pet. App. 63a n.3).

⁶Assuming that the employees had remained in Mexico since their discharge and thus were unavailable for work, the Administrative Law Judge did not order backpay. Assuming further that the employees would encounter difficulty re-entering this country, he recommended that the reinstatement offers be left open for six months. (Pet. App. 80a). The Board held that these factual assumptions were "unnecessarily speculative" and unsupported by any evidence in the record. Accordingly, the Board ordered the "conventional remedy of reinstatement with backpay" and held that the employees' actual availability for work since their discharge would be determined in compliance proceedings. (Pet. App. 63a.).

backpay would be tolled during the time that employees are unavailable for work due to their absence from the country, and that if the discriminatees are not immediately located, backpay should be placed in an escrow account "for the normal 2-year period" (Pet. App. 41a-42a). The Board added that, since there was no showing that any discriminatees had violated any of the criminal provisions of the Immigration and Nationality Act (INA) 8 U.S.C. 1101 *et seq.*, it was "unnecessary at this time to tailor our remedy to the possibility that implementation of our order would result in such violations"; any modifications of the Order which might be required could properly be deferred to compliance proceedings (Pet. App. 44a).

3. The court of appeals upheld the Board's unfair labor practice findings (Pet. App. 3a-8a, 24a). It agreed with the Board that by reporting the employees to INS petitioners had constructively discharged them and that, in doing so, petitioners were motivated by blatant anti-union animus (Pet. App. 10a-15a). The court rejected petitioners' assertions that they were unaware that the employees were illegal aliens, that the forced termination resulted from the employees' illegal status rather than petitioners' report to INS, and that petitioners were legally obligated to disclose the presence of the alien employees to INS (Pet. App. 11a-14a). The court concluded that "an employer has no right to rely on a 'moral obligation' to report illegal aliens (of which he has been previously oblivious) merely to sanctify an otherwise unjustifiable violation of section 8(a)(3)." As the court explained, to rule otherwise "would encourage employers to hire illegal aliens, who would for all practical purposes be stripped of NLRA protection and who could be fired with impunity at the first hint of union sympathy" (Pet. App. 13a-14a).

⁷See Section 10644 of the NLRB Case Handling Manual (Pt. III).

The court also agreed with the Board that reinstatement and backpay were appropriate remedies for the unlawful constructive discharges, rejecting petitioners' claim that this remedy would encourage the employees to re-enter the United States unlawfully. The court noted that, since the discriminatees had not been deported, the felony provisions of the INA, 8 U.S.C. 1326, were inapplicable and thus the discriminatees might lawfully return to this country to reclaim their jobs. Nor, as a practical matter, would the Board's remedial order provide any significant incremental inducement to unlawful re-entry (Pet. App. 17a-18a.) Accordingly, the court concluded that "the * * * grant of the conventional remedy of backpay and reinstatement does not clearly flout the immigration laws" (Pet. App. 18a).

The court also found reinstatement and backpay consistent with the policies of the National Labor Relations Act. It pointed out that the discriminatees' illegal immigration status did not interfere with their ability to perform work or with harmonious employer-employee relations (Pet. App. 19a). The court added that "[i]t would be anomalous to encourage the honest toil of illegal aliens, accepting it with the understanding that these workers had the rights of employees under the Act, but then, when violations occur, to deny them such rights by refusing effective remedies" (*ibid.*). Moreover, the court noted that, since the constructive discharges undermined bargaining strength in the crucial period after the union's certification, reinstatement and backpay for the aliens were necessary to protect the rights of the non-alien employees in the bargaining unit (*ibid.*).

The court modified the Board's order to require petitioners to reinstate the discriminatees only if they are "legally present and legally free to be employed in this country when they offered themselves for reinstatement." Noting that, absent anti-union animus, an employer may refuse employment if the applicant does not have working papers, the

court concluded that, "particularly because of the attention now focused by the government on these discriminatees and their employer, it is appropriate for this employer to remind the discriminatees that they may not legally enter the United States to claim these jobs without proper documents." Accordingly, the court ruled that such a "reminder" in petitioners' March 29, 1977 reinstatement offers did not render them defective (Pet. App. 21a-22a).

Nonetheless, the court agreed with the administrative law judge that the March 29 offers were inadequate because they (1) were not written in Spanish, (2) "were not delivered * * * in a manner allowing verification of receipt," and (3) "did not give the discriminatees a reasonable time to consider the offer and make arrangements for legally entering the United States" (Pet. App. 22a). The court rejected the administrative law judge's suggestion that six months would constitute a reasonable time to keep the offer open, however, and held that "the offer should remain open for a period of four years" (*ibid.*). New offers of reinstatement complying with these requirements "terminate the possible accrual of backpay" (Pet. App. 23a).

Finally, consistent with the requirement that there be reinstatement only if the discriminatees are legally present and permitted by law to be employed in the United States, the court modified the Board's order to make clear "(1) that * * * in computing backpay discriminatees will be deemed unavailable for work during any period when not lawfully entitled to be present and employed in the United States and (2) that backpay need not be placed in escrow for more than one year" (Pet. App. 23a, 28a-29a). Also, concerned that the discriminatees would not be lawfully present and available for work in the United States at any time prior to petitioners' valid offer of reinstatement (which it had held would toll the accrual of backpay), the court provided that the

employees should receive "a minimum of six months back-pay (of course subject to clearly mandatory and conclusively established setoffs, if any)." Pet. App. 23a-24a, 28a-29a. Otherwise, the losses suffered by the discriminatees because of petitioners' unlawful conduct would remain completely unremedied.⁸

ARGUMENT

Petitioners contend that reporting the five employees to INS was not a constructive discharge and that, in any event, certain aspects of the remedy imposed by the court of appeals are inconsistent with the policies of the immigration laws. There is no merit to any of those contentions. Accordingly, and since the propriety of the remedy provided here turns on the particular facts of this case, further review is unwarranted.⁹

⁸The Seventh Circuit explained why it believed a minimum backpay award was essential to "effectuat[e] the policies of the [National Labor Relations] Act," under the circumstances of this case. Pet. App. 23a. The court initially enforced the Board's order, as modified in other respects, and invited "the Board, *if it sees fit*, to modify [the order] further by setting a minimum period of six months during which backpay will be awarded in any event" (Pet. App. 24a, emphasis added); it added that it would "also grant enforcement of the order as so modified" (*ibid.*). The Board's proposed judgment order, however, left the court "uncertain whether the Board [had] adopted [the] suggestion" (Pet. App. 28a). The court then modified the judgment to make it clear that the discriminatees were entitled to a minimum award of six months' backpay. The Board has accepted this modification in this case, and its proposed judgment order (Pet. App. 30a-35a) was intended to grant the discriminatees the suggested minimum backpay award. The Board did not purport to articulate a general remedial policy for such cases, however, since it was unnecessary to do so under the terms of the court's remand order.

⁹The Board long has held that an illegal alien is an "employee" as defined in Section 2(3) of the National Labor Relations Act, 29 U.S.C. 152(3). See *Amy's Bakery & Noodle Co.*, 227 N.L.R.B. 214 (1976); *Handling Equipment Corp.*, 209 N.L.R.B. 64, 65 n.5 (1974); *Lawrence Rigging, Inc.*, 202 N.L.R.B. 1094, 1095 (1973); *Seidmon, Seidmon*,

1. Petitioners' claim (Pet. 16-17) that the employees' forced departure was the result of the employees' illegal status and not petitioners' discriminatorily motivated report to INS is, as the court of appeals observed, "specious" (Pet. App. 12a). "INS has a legal duty to uphold the Federal immigration laws" (Pet. 16), but it was petitioners' letter to INS advising the agency of the 5 employees' status which was the proximate cause of their departure. In these circumstances—where petitioners were aware of the employees' illegal immigration status, profited from their labor, and waited until the employees secured union representation to request an INS investigation—it is clear that "[t]he immigration laws have been conveniently employed to impose the ultimate penalty of discharge * * *" (Pet. App. 15a).¹⁰

2. Petitioners assert (Pet. 10, 12 n.6) that the court of appeals' award of a minimum of six months' backpay conflicts with the policies of the Immigration and Nationality

Henkin & Seidmon, 102 N.L.R.B. 1492, 1493 (1953). The only courts that have addressed the issue have accepted the Board's interpretation. See *NLRB v. Apollo Tire Co.*, 604 F.2d 1180 (9th Cir. 1979); 583 F.2d 355, 359 (7th Cir. 1978). Petitioners do not dispute this settled construction of the statute.

Nor do petitioners question the propriety of modifying the Board's order to prescribe a minimum backpay award in light of the court's "uncertain[ty]" (Pet. App. 28a) as to whether the Board had intended to accept the court's previous suggestion that such an award be made (see Pet. App. 24a). Compare *NLRB v. Food Store Employees*, 417 U.S. 1 (1974). In any event, as already explained, the proposed judgment order (see Pet. App. 30a-35a) was intended to provide for such an award.

¹⁰Contrary to petitioners' suggestion (Pet. 16), the court of appeals used the phrase "voluntary departure" to describe the INS Form I-274 alternative to deportation (Pet. App. 9a, 17a), *not* the employees' termination of their employment with petitioners and the employees' departure from the United States. The court left no doubt that the termination and departure were entirely involuntary, resulting directly from petitioners' unlawful conduct (Pet. App. 12a-15a).

Act because it assumes that the illegal aliens had a right "to remain in the United States for six additional months, and provides the illegal aliens with a strong incentive to return illegally to this country." The court's award was not premised on any right of the discriminatees to remain in this country. On the contrary, the court of appeals reasoned that "but for" petitioners' unfair labor practice, the illegal aliens might have remained undetected by INS and, therefore, employed by petitioners for at least six months. Pet. App. 19a, 23a-24a, 28a. Petitioners have suggested nothing that casts any doubt on the reasonableness of that conservative estimate. Nor would backpay operate as a significant additional inducement to illegal entry. The court of appeals approved petitioners' formulation of the reinstatement offer, which conditioned reinstatement on lawful re-entry (Pet. App. 22a, 31a). Moreover, as the court noted, there are substantial practical considerations that make it unlikely that any of the discriminatees will return to the United States illegally in order to obtain backpay (Pet. App. 18a). Accordingly, contrary to petitioners' contention (Pet. 12), the court's backpay award is not inconsistent with either the terms or the policies of the immigration laws.¹¹

¹¹Congress recently considered but failed to adopt legislation that would have made it unlawful to employ illegal aliens. See, e.g., H.R. 6514, 97th Cong., 2d Sess. (1982); H.R. 5872, 97th Cong., 2d Sess. (1982); S. 2222, 97th Cong., 2d Sess. (1982). If Congress were to enact such legislation, the Board would have to address the question of the appropriate remedy in cases such as this in that very different legal context.

Petitioners' reliance (Pet. 12 & n.6) on *Southern Steamship Co. v. NLRB*, 316 U.S. 31 (1942), is misplaced. In *Southern Steamship*, the Court held that the Board abused its discretion in ordering reinstatement of employees who had been discharged for participating in a strike that violated federal criminal statutes. Here, however, the employees were discharged for supporting a union, activity that violates no federal statute. Indeed, that activity is protected by Section 7 of the National Labor Relations Act, 29 U.S.C. 157.

Nor is there merit to petitioners' claim (Pet. 13-15) that the six month-minimum backpay award is "punitive." As already noted, the minimum backpay award rests on the court's conclusion that the discriminatees would have continued in petitioners' employment for at least six months if petitioners had not reported them to INS (Pet. App. 28a). It is plain beyond serious dispute that each of the aliens would have continued to work for some period beyond February 18, 1977, but for petitioners' unlawfully motivated report to INS. It is equally plain, therefore, that each of the aliens suffered some injury from petitioners' unfair labor practices, although it is impossible to determine precisely how much. As this Court has noted in another context, "it does not 'come with very good grace' for the wrongdoer to insist upon specific and certain proof of the injury * * * it has itself inflicted." *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 566-567 (1981); see *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 563 (1931) ("Where the tort itself is of such a nature as to preclude the ascertainment of the amount of damages with certainty, it would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for his acts"). Here, the backpay award serves the wholly legitimate remedial purpose of compensating the injured employees and vindicating their rights under the National Labor Relations Act. See, e.g., *NLRB v. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 263 (1969). To the extent the award has the incidental effect of deterring future violations it is also legitimate. Compare *id.* at 265, with *Republic Steel Corp. v. NLRB*, 311 U.S. 7, 11-13 (1940).

Finally, contrary to petitioners' contention (Pet. 18-20), the requirement that petitioners' reinstatement offers be held open for four years, be written in Spanish, and be delivered so as to verify receipt are not inappropriate in the

circumstances of this case. The discriminatees are Spanish-speaking residents of Mexico; receipt of the offers of reinstatement through regular mail is uncertain; and "legal re-entry into the United States may require years of [legal] effort" (Pet. App. 22a, 80a). Thus, the unusual features of the remedy simply reflect the particular facts of this case.

CONCLUSION

The petition for a writ of certiorari should be denied.¹²

Respectfully submitted.

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FEBRUARY 1983

¹²Petitioners do not challenge the Board's finding that the letter to INS was motivated by anti-union animus, so there is no reason to withhold action on this petition pending disposition of *NLRB v. Transportation Management Corp.*, cert. granted, No. 82-168, (Nov. 15, 1982). Nor are the issues in this case sufficiently similar to those raised in *Bill Johnson's Restaurants, Inc. v. NLRB*, cert. granted, No. 81-2257 (Oct. 18, 1982), to warrant delaying action on the petition pending disposition of that case.

JUN 22 1983

ALFONSO L. STEVAS,

CLERK

No. 82-945

**In the
Supreme Court of the United States**

OCTOBER TERM, 1982

SURE-TAN, INC. and SURAK LEATHER COMPANY,
Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF OF PETITIONERS

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QUESTIONS PRESENTED

1. Whether an employer "constructively discharges" employees who are illegal aliens in violation of Section 8(a)(1) and (3) of the National Labor Relations Act ("NLRA") by asking the Immigration and Naturalization Service to determine the employees' immigration status.

2. Whether the National Labor Relations Board can order backpay for illegal aliens who were deported to Mexico and therefore were unavailable for work, thereby creating a fundamental conflict between the NLRA and the Immigration and Nationality Act.

3. Whether the imposition of an arbitrary six month backpay liability constitutes an improper punitive remedy violative of Section 10(c) of the NLRA.

4. Whether the NLRA requires that an offer of reinstatement to illegal aliens be held open for four years, be delivered in Mexico in a manner allowing verification of receipt, and be written in Spanish.

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OPINIONS BELOW

The unpublished Order and Judgment of the United States Court of Appeals for the Seventh Circuit, entered on July 12, 1982, are found in the appendix to the Petition for a Writ of Certiorari in this case. (25a and 30a).¹

The decision of The United States Court of Appeals for the Seventh Circuit denying the Petition for Rehearing and Suggestion for Rehearing *En Banc*, entered on May 5, 1982, is reported at 677 F.2d 584. (36a).

The opinion of The United States Court of Appeals for The Seventh Circuit, entered on February 24, 1982, as amended on February 26, 1982, is reported at 672 F.2d 592. (1a).

The decision and order of the National Labor Relations Board, entered on March 6, 1978, is reported at 234 N.L.R.B. 1187. (61a).

JURISDICTION

The Judgment of the Court of Appeals was entered on July 12, 1982. (25a, 30a). The Petition for a Writ of Certiorari was filed on December 6, 1982 and granted on March 7, 1983. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, RULES AND REGULATIONS INVOLVED

First Amendment to the Constitution of the United States

Congress shall make no law . . . abridging . . . the right of the people . . . to petition the Government for a redress of grievances.

¹ References herein to opinions and orders reproduced in the appendix to the Petition for a Writ of Certiorari will be denoted with the designation "a". References to the General Counsel's and the Respondent's Exhibits will be denoted with the designation "G.C.Ex." and "R.Ex.", respectively. References to the transcript will be denoted with the designation "Tr."

National Labor Relations Act

Section 7 of the National Labor Relations Act of 1947, 29 U.S.C. § 157, provides, in pertinent part, as follows:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. . . .

Section 8(a)(1) and (3) of the National Labor Relations Act of 1947, 29 U.S.C. § 158(a)(1) and (3), provides, in pertinent part, as follows:

(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 . . . ;

. . .

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization.

Section 10(c) of the National Labor Relations Act of 1947, 29 U.S.C. § 160(c), provides, in pertinent part, as follows:

If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without backpay, as will effectuate the policies of this [Act] . . . No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any backpay, if such individual was suspended or discharged for cause.

Immigration and Nationality Act

Section 212(a)(14) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(14), provides, in pertinent part, as follows:

- (a) Except as otherwise provided in this chapter, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission to the United States:

...

- (14) Aliens seeking to enter the United States, for the purpose of performing skilled or unskilled labor, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that (A) there are not sufficient workers who are able, willing, qualified ... and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and (B) the employment of such aliens will not adversely affect the wages and working conditions of the workers in the United States similarly employed.

Section 241 of the Immigration and Nationality Act, 8 U.S.C. § 1251, provides, in pertinent part, that:

- (a) Any alien in the United States (including an alien crewman) shall, upon order of the Attorney General, be deported who—
 - (1) at the time of entry was within one or more of the classes of aliens excludable by the law existing at the time of such entry ...

Section 275 of the Immigration and Nationality Act, 8 U.S.C. § 1325, provides, in pertinent part, that:

Any alien who (1) enters the United States at any time or place other than as designated by immigration officers, or (2) eludes examination or inspection by immigration officers, or

(3) obtains entry to the United States by a willfully false or misleading representation or the willful concealment of a material fact, shall, for the first commission of any such offenses, be guilty of a misdemeanor and upon conviction thereof be punished by imprisonment for not more than six months, or by a fine of not more than \$500, or by both, and for a subsequent commission of any such offenses shall be guilty of a felony and upon conviction thereof shall be punished by imprisonment for not more than two years, or by a fine of not more than \$5,000, or both.

Section 287 of the Immigration and Nationality Act, 8 U.S.C. § 1357, provides, in pertinent part, that:

- (a) Any officer or employee of the Service authorized under regulations prescribed by the Attorney General shall have power without warrant—
 - (1) to interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States

National Labor Relations Board Casehandling Manual

Section 10528.15 of the National Labor Relations Board Casehandling Manual (Part III) provides as follows:

To avoid misunderstanding, the compliance officer should advise employers to make offers of reinstatement in writing and should likewise advise discriminatees to respond thereto in writing.

Section 10530.1 of the National Labor Relations Board Casehandling Manual (Part III) provides, in pertinent part, as follows:

- (a) *Period Covered:* The period covered is that from the discriminatory loss or refusal of employment to a bona fide offer of reinstatement, but it does not include any period . . . (2) during which respondent proves the discriminatee was not available for work . . .
- (b) *Backpay Period:* The period of time during which backpay accrues, usually between the date of discrimination and the date a bona fide offer of reinstatement is made.

Section 10612 of the National Labor Relations Board Casehandling Manual (Part III) provides as follows:

When a discriminatee becomes unavailable gross backpay does not accrue until discriminatee becomes available again . . .

Proposed Immigration Reform and Control Act of 1983

S. 529, 98th Cong., 1st Sess., 129 CONG. REC. 6970 (daily ed. May 18, 1983), provides, in pertinent part, as follows: Sec. 101(a)(1) Chapter 8 of title II is amended by inserting after section 274 (8 U.S.C. 1324) the following new section:

"Unlawful Employment of Aliens"

"Sec. 274A. (a)(1) It is unlawful for a person or other entity after the date of the enactment of this section—

"(A) to hire, or for consideration to recruit or refer, for employment in the United States an alien knowing the alien is an unauthorized alien (as defined in paragraph (4)) with respect to such employment.

* * *

(2) It is unlawful for a person or other entity who, after hiring an alien for employment subsequent to the date of the enactment of this Act and in accordance with paragraph (1), continues to employ the alien in the United States knowing the alien is (or has become) an unauthorized alien with respect to such employment.

* * *

(d)(1)(A) In the case of a person or entity with violates paragraph (1)(A) or (2) of subsection (a) and which—

(i) has not previously been determined (after opportunity for a hearing under paragraph (4)(A)) to have violated either such paragraph, the person or entity shall be subject to a civil penalty of \$1,000 for each unauthorized alien with respect to which the violation occurred.

* * *

Sec. 101(a)(2)(A) Except as provided in subparagraph (B), the amendment made by paragraph (1) shall take effect on the date of the enactment of this Act.

(B)(i) Where the Attorney General has reason to believe that a person or entity may have violated subsection (a) of

section 274A of the Immigration and Nationality Act during the six-month period beginning on the first day of the first month beginning after the date of the enactment of this Act, the Attorney General shall notify such person or entity of such belief and shall not conduct any proceeding, nor impose any penalty, under such section on the basis of such alleged violation or violations.

(ii) Where the Attorney General has reason to believe that a person or entity may have violated subsection (a) of section 274A of the Immigration and Nationality Act during the subsequent six-month period, the Attorney General shall, in the first instance of such a violation (or violations) occurring during such period, provide a warning to the person or entity that such a violation or violations may have occurred and shall not conduct any proceeding, nor impose any penalty, under such section on the basis of such alleged violation or violations.

H.R. 1510, 98th Cong., 1st Sess. (1983), provides, in pertinent part, as follows:

SEC. 101(a)(1) Chapter 8 of title II is amended by inserting after section 274 (8 U.S.C. 1324) the following new section:

"Unlawful Employment of Aliens"

"SEC. 274A. (a)(1) It is unlawful for a person or other entity after the date of the enactment of this section to hire, or to recruit or refer for a fee or other consideration, for employment in the United States —

"(A) an alien knowing the alien is an unauthorized alien (as defined in paragraph (4) with respect to such employment

. . .

"(2) It is unlawful for a person or other entity, after hiring an alien for employment subsequent to the date of the enactment of this section and in accordance with paragraph (1), to continue to employ the alien in the United States knowing the alien is (or has become) an unauthorized alien with respect to such employment.

. . .

"(d)(1)(A) In the case of a person or entity which has not previously been cited under this subparagraph, if the Attorney General, based on evidence or information he deems persuasive, reasonably concludes that the person or entity has hired, or has recruited or referred for a fee or other consideration, for employment in the United States an unauthorized alien, the Attorney General may serve a citation on the person or entity containing a notification that the alien's employment is not authorized and a warning of the penalties and injunctive remedy set forth in this subsection.

"(B) In the case of a person or entity which has previously been cited under subparagraph (A), which is determined (after notice and opportunity for an administrative hearing under paragraph (4)(A)(i) to have violated paragraph (1)(A) or (2) of subsection (a), and which—

"(i) has not previously been subject to a civil penalty under this subparagraph, the person or entity shall be subject to a civil penalty of \$1,000 for each unauthorized alien with respect to which the violation occurred

* * *

[Sec. 101(a)](2)(A) No citation, civil or criminal penalty, or injunction may be issued under section 274A of the Immigration and Nationality Act for the hiring, or recruiting or referring for a fee or other consideration, for employment of individuals occurring before the first day of the seventh month beginning after the date of the enactment of this Act.

STATEMENT OF THE CASE

Respondents Sure-Tan, Inc. and Surak Leather Company ("Sure-Tan") are two small leather processing and sales firms located in Chicago, Illinois. Both firms are owned by the same persons. Sure-Tan employed approximately 11 workers in 1976. A number of these employees were Mexican nationals. (2a).

In August, 1976, the Chicago Leather Workers Union, Local 431, Amalgamated Meatcutters and Butcher Workmen of North America (the "union") filed an election petition with the National Labor Relations Board (the "Board"). An election was held on December 10, 1976. The union won the election and was certified as the employees' collective bargaining representative on January 19, 1977. (2a).

After the union was certified, John Surak, one of the owners of Sure-Tan, by letter dated January 20, 1977, asked the Immigration and Naturalization Service ("INS") to determine the immigration status of eight of its employees. (G.C. Ex. 18; Tr. 26; 8-9a). In response to this letter, the INS checked its files to see if the individuals named were lawful permanent residents of the United States. On February 18, 1977, INS agents visited Sure-Tan and discovered that five of the eight employees listed in Surak's letter were residing illegally in the United States. These illegal aliens were arrested by INS agents. Each illegal alien was permitted by the INS to execute INS form I-274, whereby he acknowledged that he was a Mexican citizen illegally present in the United States. The illegal aliens were then placed aboard a bus that transported them back to the Mexican border. (9-10a).

The Board's General Counsel issued complaints against Sure-Tan on February 22, 1977 and March 23, 1977, alleging, *inter alia*, that Sure-Tan discriminatorily discharged the five illegal alien employees by causing their deportation in violation of Sections 8(a)(1) and (3) of the National Labor Relations Act (the "Act"). (66a). On March 29, 1977, Sure-Tan mailed letters offering reinstatement to the five illegal aliens. Each letter stated as follows:

Sure-Tan, Inc. offers you full and complete reinstatement of your former job, provided only that your reemployment shall not subject Sure-Tan, Inc. to any violations of the United States immigration laws.

Please report to work no later than May 1, 1977, if you accept this offer of re-employment.

(R.Ex. 1A-E; Tr. 13, 15; 20a).

The Administrative Law Judge concluded that Sure-Tan constructively discharged the five illegal aliens who were deported to Mexico in retaliation for their support for the union by requesting INS to investigate their immigration status. The ALJ's recommended order called for Sure-Tan to offer reinstatement to the employees, with the offer to remain open for six months. The ALJ reasoned that, since the alleged discriminatees were not available for employment after their return to Mexico, there should be no backpay award. (80-81a). A three member panel of the Board (Fanning, Jenkins, and Penello), in its decision and order of March 6, 1978, adopted the findings and conclusions of the ALJ, but modified the remedy, ordering that the illegal aliens be offered unconditional reinstatement with backpay. (63-64a).

The Board's General Counsel, on September 7, 1978, filed a "Motion for Clarification", requesting that the Board "make plain" what the Company's obligations were under the Board's order. (53a). The General Counsel observed that the order "appears to require reinstatement and backpay without regard to the discriminatee's illegal alien status . . ." (55a). Such result, the General Counsel noted, would be "contrary to national immigration policies and laws," because it would encourage the alleged discriminatees to reenter the country illegally. (55-56a).

A majority of the Board members (Fanning, Jenkins and Truesdale) issued an order on December 5, 1979 denying the General Counsel's Motion for Clarification and reaffirming the Board's earlier order. (44a). Members Penello and Murphy dissented. Member Penello would have limited the order "so as to require [Sure-Tan] to offer reinstatement only to discriminatees lawfully in the country". (45a). Member Murphy would have limited the backpay period "to the time from the date of discharge to the date of deportation," and would have also limited the time for acceptance of the Company's reinstatement offer to two weeks. (50-51a).

The court of appeals, in its decision of February 24, 1982, enforced the Board's order, subject to the following modifications: (1) reinstatement would be required only if the alleged discriminatees were lawfully entitled to be present and employed in this country when they offer themselves for reinstatement (22a); (2) in computing backpay, the discriminatees would be deemed unavailable for work during any period when they were not lawfully entitled to be present and employed in the United States (23a); (3) backpay would be placed in escrow for a period of one year (23a); and (4) the Board, "if it sees fit," could modify its order further by setting a minimum period of six months for which backpay would be awarded, regardless of the lawful unavailability of the discriminatees for work during the backpay period. (23-24a). The court of appeals also held that Sure-Tan's prior offer of reinstatement was defective because it did not hold the offers open for a period of four years, was not delivered in a manner allowing verification of receipt, and was not written in Spanish. (22a).

In its judgment and order of July 12, 1982, the court of appeals eliminated the discretion it had previously given the Board to modify its order with respect to backpay, and required that each discriminatee be awarded a minimum of six months' backpay. (23a).

SUMMARY OF ARGUMENT

1. Sure-Tan did not "constructively discharge" employees who were illegal aliens in violation of Sections 8(a)(1) and (3) of the NLRA when it asked INS to investigate their immigration status. Their deportation was caused by their own illegal status. Sure-Tan should not be penalized for actions of the INS, where those actions were non-discretionary duties mandated by federal immigration laws.

Moreover, Sure-Tan's request of the INS to investigate the immigration status of its employees was protected by the first amendment right to petition the government. This Court recently recognized in *Bill Johnson's Restaurants, Inc. v. NLRB*, 51 U.S.L.W. 4396 (U.S. May 31, 1983) that the filing of a lawsuit, even for a retaliatory motive, is protected under the first amendment right to petition and is not an unlawful labor practice so long as the lawsuit has a reasonable basis. The right to petition the government extends to petitions to law enforcement agencies as well as to civil actions. The public interest in enforcing the immigration laws is just as strong as the interest in redressing civil wrongs. There is no question that Sure-Tan had a reasonable basis for requesting the INS to investigate the immigration status of its employees. The aliens in fact acknowledged their unlawful status and voluntarily returned to Mexico. Because Sure-Tan's petition to the INA was protected under the first amendment, it was not an unlawful constructive discharge, regardless of Sure-Tan's motives for petitioning the INS.

2. The court of appeals' backpay award undermines federal immigration laws. The court, in effect, treats the illegal aliens as if they had a right to remain in this country for an additional six months after their detection by the INS. Moreover, the court's remedy would reward the illegal aliens with six months' backpay for their violation of the immigration laws. The windfall backpay award would also provide the illegal aliens with an incentive to unlawfully reenter this country.

This Court has recognized that the Board is obligated to formulate remedies that comport with congressional objectives under other statutes. *Southern Steamship Co. v. NLRB*, 316 U.S. 31, 47 (1942). A backpay award that treats the illegal aliens as though they had a right to remain in this country unlawfully, rewards them for their violation of

federal immigration laws, and encourages their illegal re-entry into this country creates an untenable conflict between the NLRA and the INA. Harmonization of the Board's remedial order with federal immigration laws requires the elimination of the backpay award.

3. The award of six months' backpay to the illegal aliens constitutes an improper punitive remedy violative of Section 10(c) of the NLRA. This Court has recognized that Board remedies must be remedial, not punitive. *Consolidated Edison Co. of New York, Inc. v. NLRB*, 305 U.S. 197, 236 (1938). A Board order is punitive where it is shown to be a "patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act." *Virginia Electric & Power Co. v. NLRB*, 319 U.S. 533, 540 (1943).

The courts and the Board have established that the policies of the NLRA are effectuated by tolling backpay for periods when employees are not available for work, including periods where, as in the present case, the unavailability results from enforced absence from the country. The court's assessment of an arbitrary six month backpay liability on Sure-Tan, regardless of the unavailability of the illegal aliens for work, contrary to the Board's established procedure for computing backpay, represents a patent attempt to penalize Sure-Tan. It was improper for the court of appeals to preempt the legislative process by imposing judicially-created punitive sanctions on Sure-Tan, particularly where Congress, thus far, has chosen not to impose punitive sanctions on violators of the NLRA or on employers of illegal aliens.

4. The court of appeals' requirement that Sure-Tan's reinstatement offers remain open for four years places an unreasonable burden upon Sure-Tan and its present employees. The Board and the courts have repeatedly upheld reinstatement offers that remained open for less than the 30 day period afforded in Sure-Tan's reinstatement offers. It

would not serve the purposes of the NLRA to afford preferential treatment to those who violate federal immigration laws, particularly where it would likely result in the displacement of American workers. The requirements that Sure-Tan's reinstatement offers be written in Spanish and be sent in a manner allowing verification of receipt are also unwarranted departures from established Board precedent. The Board has not previously required reinstatement offers to be written in an employee's native language, or to be sent in a manner permitting verification of receipt. It is fundamentally unfair to impose such extraordinary "remedies" upon Sure-Tan.

ARGUMENT

I. SURE-TAN DID NOT CONSTRUCTIVELY DISCHARGE EMPLOYEES WHO WERE ILLEGAL ALIENS WHEN IT ASKED THE IMMIGRATION AND NATURALIZATION SERVICE TO DETERMINE THE EMPLOYEES' IMMIGRATION STATUS.

A. The Court of Appeals Misapplied The Constructive Discharge Doctrine.

The court of appeals concluded that Sure-Tan's inquiry to the Immigration and Naturalization Service ("INS") concerning the status of its Spanish-speaking employees was motivated by anti-union animus and "was the proximate cause of their departure." (12a). Using the doctrine of "constructive discharge" to brand Sure-Tan's inquiry to the INS as illegal, the court held that Sure-Tan violated Sections 8(a)(1) and (3) of the National Labor Relations Act (the "Act")² when it asked INS to investigate its employees. (15a)³.

³ 29 U.S.C. § 151 *et seq.*

² Adopting the rationale of the Fifth Circuit in *NLRB v. Haberman Construction Co.*, 641 F.2d 351, 358 (5th Cir. 1981) (en banc), the Court

(footnote continued)

Contrary to the court of appeals' conclusion, the return of the illegal aliens to Mexico was "proximately caused" by their own illegal status. Sure-Tan's inquiry to the INS facilitated the Service's performance of its statutory obligations. The inquiry in no way mandated the actions of the INS. The INS has a legal duty to uphold the federal immigration laws—a duty that is not legally conditioned upon or modified by the actions of Sure-Tan.⁴ It would be fundamentally unfair to hold Sure-Tan responsible for the actions of the INS, where those actions were non-discretionary duties mandated by federal immigration laws.⁵

(footnote continued)

of Appeals reasoned that:

[T]wo elements are required to establish a constructive discharge. "First, the employer's conduct must have created working conditions so intolerable that an employee is forced to resign. Second, the employer must have acted 'to encourage or discourage membership in any labor organization' within the meaning of Section 8(a)(3) of the Act." (12a).

The first element is absent in this case, because the employees' illegal presence in this country, not the actions of Sure-Tan, mandated their deportation.

⁴ The duties of an INS officer include the interrogation of any alien or person believed to be an alien as to his right to remain in the United States. 8 U.S.C. § 1357. The immigration laws further call for deportation of any alien who, at the time of entry into the United States, was within one of the classes of excludable aliens (8 U.S.C. § 1251(a)(1)), including aliens who, like the illegal aliens in the present case, entered the United States unlawfully for the purpose of performing skilled or unskilled labor. 8 U.S.C. § 1182(a) (14). Immigration officers, upon taking office, pledge to "faithfully discharge the duties of the office. . . ." 5 U.S.C. § 3331.

⁵ The INS has no discretion with respect to deportation of illegal aliens, regardless of whether the illegal aliens are reported to INS by their employer for improper motives.

When an immigration statute makes an alien deportable as 8 U.S.C. § 1251(a)(2) (1976) does here, and INS enforcement

(footnote continued)

The court of appeals noted that it is of "considerable significance" that the alleged discriminatees were not deported by the INS, but rather voluntarily departed from this country after executing an INS form I-274. (9a, n. 11; 17a). Under this analysis, the court of appeals would hold Sure-Tan responsible for actions voluntarily undertaken by the illegal aliens. As noted by Judge Wood in his dissent to the court's order denying Sure-Tan's Petition for Rehearing:

If we [had analyzed the case properly] I do not believe that the employers' notification to the Immigration and Naturalization Service would be construed as a "constructive discharge" so as to reward the illegal aliens for their illegal labor activities with possible reinstatement and back pay.

* * *

Rather than approve the majority's concocted remedy, I would, even if it took some stretching of the doctrine, simply consider the case moot when the illegal aliens "voluntarily" returned to their country . . . As it is, this court has given proxies to illegal aliens to cast votes for American workers and now has given the illegal aliens some encouragement to come back, displace our own workers and be awarded a backpay bonus for doing it. At least the view of the majority may serve to inspire Congress to rescue us from this state of things which is our own judicial doing.

(38a).

Sure-Tan and American workers, however, should not have to await uncertain congressional action to redress this improper imposition of liability for actions of the INS. This Court should reverse the court of appeals' misapplication of the constructive discharge doctrine.

(footnote continued)

officials seek deportation, the immigration judge is without power to terminate the proceedings on equitable, humanitarian, or other grounds not specified by the statute.

Rodriguez-Gonzalez v. INS, 640 F.2d 1139, 1142 (9th Cir. 1981).

B. Punishing Sure-Tan For Reporting A Suspected Violation Of The Immigration Laws Constitutes A Denial of Sure-Tan's Constitutional Right To Petition The Government.

The court of appeals' misuse of the constructive discharge doctrine is particularly alarming here, where it results in penalizing Sure-Tan for reporting a suspected violation of the law. The court of appeals and the Board have held, in effect, that once illegal alien workers engage in protected union activities, an employer may no longer inquire with the INS, even if it suspects that it might be employing illegal aliens. But an employer has no such duty of silence. There is, if anything, a duty of disclosure. As noted by the Ninth Circuit in *NLRB v. Apollo Tire Co., Inc.*, 604 F.2d 1180, 1183 (9th Cir. 1979): "An employer who suspects that an employee is in the United States without proper authority should report this information to the INS."⁶

Regardless of whether Sure-Tan had a duty to report its illegal alien employees to the INS, it nevertheless had a right to do so. The first amendment to the Constitution provides, in pertinent part, that "Congress shall make no law . . . abridging . . . the right of the people . . . to petition the Government for a redress of grievances." The right to petition is "among the most precious of the liberties safeguarded by the Bill of Rights." *United Mine Workers of America, District 12 v. Illinois State Bar Association*, 389

⁶ The public policy favoring reporting of violations of the law is reflected in the federal misprision of felony statute, 18 U.S.C. § 4, which subjects persons who fail to report a felony to a fine of up to \$500 and a prison term of up to three years, or both. In addition, cases dealing with the tort of malicious prosecution consistently say that the tort is disfavored by the law, because public policy favors the prosecution of crime and demands that citizens who report such crimes be protected. See, e.g., *Hernan v. Revere Copper & Brass Inc.* 494 F.2d 705 (8th Cir.), cert. denied, 419 U.S. 867 (1974); *Frohlich v. Miles Laboratories, Inc.*, 316 F.2d 87 (9th Cir.), cert. denied, 375 U.S. 825 (1963).

U.S. 217, 222 (1967). It shares the "preferred place" accorded in our system of government to the first amendment freedoms, and has "a sanctity and a sanction not permitting dubious intrusions." *Thomas v. Collins*, 323 U.S. 516, 530 (1945). As this Court recognized in *United States v. Cruikshank*, 92 U.S. 542, 552 (1876), the right to petition is logically implicit in and fundamental to the very idea of a republican form of governance.

Nor is the right to petition conditioned upon the motives of the petitioner. In *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, *reh'g denied*, 365 U.S. 875 (1961), this Court held that railroad companies that pursued a variety of actions, including encouraging rigid enforcement of state laws against trucking companies for the purpose of undermining their competitive position, were shielded from antitrust liability by the first amendment right to petition. This Court observed that:

The right of the people to inform their representatives in government of their desires with respect to the passage or enforcement of laws can not properly be made to depend on their intent in doing so. It is neither unusual nor illegal for people to seek action on laws in the hope that they may bring about an advantage to themselves and a disadvantage to their competitors. (Emphasis added).

Id. at 139.

In *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510-11 (1972), this Court recognized that the right to petition goes beyond the right of access to courts, and extends "to all departments of the Government," including administrative agencies, regardless of the plaintiff's motive,⁷ unless the action was a "mere sham" filed for harassment purposes.

⁷ In *Stern v. United States Gypsum, Inc.*, 547 F.2d 1329 (7th Cir.), *cert. denied*, 434 U.S. 975 (1977), a taxpayer's complaint concerning the

(footnote continued)

The relationship between the first amendment right to petition and the NLRA was recently addressed by this Court in *Bill Johnson's Restaurants, Inc. v. NLRB*, 51 U.S. L.W. 4636 (U.S. May 31, 1983), wherein the Court held that "the filing of a meritorious law suit, even for a retaliatory motive, is not an unfair labor practice." *Id.* at 4640. The Court observed that the first amendment right to petition the government is a fundamental right that is "too important to be called an unfair labor practice solely on the ground that what is sought in the court is to enjoin employees from exercising a protected right." *Id.* at 4639, quoting *Peddie Buildings*, 203 N.L.R.B. 265, 272 (1973), *enforcement denied on other grounds*, 498 F.2d 43 (3d Cir. 1974). Applying the "sham exception" doctrine of *California Motor Transport Co.*, *supra*, this Court held that the first amendment right to petition shields a petitioner from liability under the NLRA, unless the petitioner's use of the legal processes lacks a "reasonable basis." *Id.* at 4639.

Applying this reasoning to the present case, Sure-Tan's request for enforcement of federal immigration laws is squarely within the protection of the first amendment right to petition the government. The right to petition an agency to enforce the law is as fundamental as the right to file a lawsuit. As this Court observed in *Bill Johnson's Restaurants*, the NLRA must be interpreted so as to safeguard "the substantial State interest in protecting the health and well being of its citizens." 51 U.S. L.W. at 4639. Nothing could be more essential to the public welfare than the untrammelled right of citizens to report a violation of the law.

(footnote continued)

activities of a government auditor was held to be protected by the first amendment right to petition. The court observed that it was "irrelevant to the applicability of the right to petition that its exercise might have the effect of causing professional injury to the official about whom complaints are made, or even that the complainer may be aware of or pleased by the prospect of such injury." *Id.* at 1343.

There is no question that Sure-Tan's request to the INA had a "reasonable basis," because the illegal aliens acknowledged their unlawful status and voluntarily returned to Mexico. The Board's finding of animus, which is not contested for purposes of this appeal, does not deprive Sure-Tan of its first amendment right to petition the government. *Id.* at 4640. Sure-Tan's petition to the INA, therefore, was not an unlawful constructive discharge.

As stated by Judge Wood in his dissent to the court's order denying Sure-Tan's Petition for Rehearing:

The NLRB seems to use only its private knothole to view these issues and sees nothing except its own labor goals. I think this court instead of peering through the NLRB's knothole should look over the fence for a better understanding of the whole problem. (38a).

This Court's mandate in *Southern Steamship Co. v. NLRB*, 316 U.S. 31, 47 (1942), as well as its holding in *Bill Johnson's Restaurants, supra*, requires that the NLRA be interpreted in harmony with constitutionally protected rights. This harmonization requires "looking over the fence" and recognizing that one should not be penalized for reporting a violation of the law.

II. THE BACKPAY AWARD SUBVERTS FEDERAL IMMIGRATION LAWS.

A. The Court's Remedial Order Rewards Illegal Aliens For Violating The Immigration Laws.

The Board's remedial order, requiring unconditional reinstatement and backpay for the illegal aliens, created a fundamental conflict between the NLRA and the Immigration and Naturalization Act ("INA").⁸ The court of appeals

⁸ 8 U.S.C. § 1101 *et seq.*

did not remove, but partially alleviated this conflict by restricting reinstatement to aliens lawfully present in the country. (22-23a).

The court of appeals, like the Board, displayed remarkable indifference to federal immigration policies when it awarded a minimum of six months' backpay to each of the illegal aliens regardless of their lawful unavailability for work. By concluding that six months would be "the minimum [time] during which the discriminatees might reasonably have remained employed without apprehension by INS, but for the employer's unfair labor practice" (23a; 28-29a; 32a), the court treats the illegal aliens as though they had a right to remain in this country illegally for an additional six months after detection, when in fact they had no legal right to enter this country. Their unsanctioned entry was a crime.⁹

This Court observed in *Plyler v. Doe*, 102 S. Ct. 2382, 2396 (1982) that "those who elect to enter our territory by stealth and in violation of our law should be prepared to bear the consequences, including, but not limited to, deportation." It would seriously undermine federal immigration laws to treat those who enter this country by stealth in violation of the law as though they had a right to remain in this country illegally for an additional six months after their detection by the INS.

It is even more offensive that the court's remedy would reward the illegal aliens with six months' backpay for their violation of the immigration laws. The federal government clearly recognizes the inappropriateness of rewarding illegal aliens with the benefits of social welfare programs.¹⁰ Simi-

⁹ Section 275 of the INA, 8 U.S.C. §1325, provides that any alien who unlawfully enters the United States commits a misdemeanor and for subsequent commission of such offense shall be guilty of a felony.

¹⁰ Illegal aliens are excluded from the Food Stamp Program, 7 U.S.C. § 2015(f) and 7 C.F.R. § 273.4 (1982), the old age assistance, aid to

(footnote continued)

larly, states have excluded illegal aliens from unemployment compensation benefits.¹¹ It would be indeed anomalous to require a private employer to reward illegal aliens for their unlawful presence in this country, when federal and state governments have expressly declined to do so.¹²

(footnote continued)

families with dependent children, aid to the blind, aid to the permanently and totally disabled, and supplemental security income programs, 45 C.F.R. § 233.50 (1982), the Medicare Hospital Insurance Companies Program, 42 U.S.C. § 1395(i)-2 and 42 C.F.R. § 405.205(b)(1982), and the Medicaid Hospital Insurance Benefits for the Aged and Disabled Program, 42 U.S.C. § 1395(o) and 42 C.F.R. § 405.103(a)(4)(1982). See *Plyler v. Doe*, 102 S. Ct. at 2413 (Burger, C. J., dissenting). In addition, the Federal Unemployment Tax Act, 26 U.S.C. § 3304 *et seq.* subjects states to loss of federal funding if unemployment benefits are paid to illegal aliens. See *New Hampshire Department of Employment Security v. Marshall*, 616 F.2d 240, 241-42, *cert. denied and appeal dismissed*, 449 U.S. 806 (1980).

¹¹ Courts in several states have specifically held that illegal aliens are not "available for work" within the meaning of the state's unemployment compensation statute, and therefore are not eligible for unemployment benefits. See, e.g. *Alonso v. State*, 50 Cal. App. 3d 242, 123 Cal. Rptr. 536 (2d Dist. 1975); *Pinilla v. Board of Review*, 155 N.J. Super 307, 382 A.2d 921 (N.J. Super. Ct. App. Div. 1978).

¹² As observed by the court in *Alonso v. State*, 50 Cal. App.3d 242, 254, 123 Cal. Rptr. 536, 544 (2d Dist. 1975):

To allow an illegal alien to collect unemployment benefits would reward him for his illegal entry into this country. In essence, his entry into this country is fraudulent, and as such he should not be allowed to profit from the illegal act.

In the present case, the illegal aliens should not be rewarded for their unlawful presence in this country with backpay, anymore than they should be rewarded with unemployment compensation.

B. The Backpay Award Encourages Illegal Immigration.

The backpay award also provides the illegal aliens with an incentive to reenter this country illegally. The court of appeals acknowledged that "[i]t obviously remains a possibility . . . that the discriminatees in this case might be motivated to reenter the United States unlawfully to claim reinstatement and backpay." (18a). The Board's General Counsel, in his Motion for Clarification, also recognized this danger, stating:

As a practical matter, a discriminatee would be encouraged to return to the United States illegally, so that he could reap these job and monetary benefits as soon as possible, rather than postpone and perhaps give up these benefits entirely by delaying his return until that uncertain day, far in the future, when he *may* be able to enter the United States lawfully.

(55a).¹³

The court sidesteps this issue by surmising that an alien would be unlikely to attempt to illegally reenter the United States to pursue his remedy, and thereby "draw attention to his illegal alien status." (18a). The court further speculates that: "Indeed, the economic and social attractions which generally encourage illegal migration to this country are probably more compelling inducements than the special fruit of the Board's order might be in this case." (18a).

Contrary to the court of appeals' unsupported conclusion, the windfall backpay award would indeed provide a "compel-

¹³ Members Penello and Murphy, in their dissenting opinions to the Board's Order denying the Motion for Clarification, concurred with the General Counsel that the Board's conventional remedy of reinstatement and backpay would subvert federal immigration policy. As observed by member Penello, it is incumbent upon the Board "to take cognizance of other statutes and accommodate to them if we can." (48a).

ling inducement" to the aliens to reenter this country illegally. Such an inducement would subvert federal immigration objectives.

C. The Board's Remedial Order Must Comport With The Immigration Laws.

This Court has recognized that the Board is obligated to formulate remedies that comport with congressional objectives under other statutory schemes. In *Southern Steamship Co. v. NLRB*, 316 U.S. 31, 47 (1942), this Court faulted the Board for ordering reinstatement and backpay to striking seamen when the order ran contrary to a federal anti-mutiny statute, stating:

[T]he Board has not been commissioned to effectuate the policies of the Labor Relations Act so single-mindedly that it may wholly ignore other and equally important Congressional objectives. Frequently the entire scope of Congressional purpose calls for careful accommodation of one statutory scheme to another, and it is not too much to demand of an administrative body that it undertake this accommodation without excessive emphasis upon its immediate task.¹⁴

Similarly, in the present case, it is not too much to demand of the Board and the court of appeals that they formulate remedies that comport with the objectives of the INA. Those objectives are clear—to protect American workers from an influx of foreign labor by imposing criminal sanctions on those who violate federal immigration laws.¹⁵

¹⁴ To the same effect, in *McLean Trucking Co. v. United States*, 321 U.S. 67, 80 (1944), this Court instructed that, when an agency is "faced with overlapping and at times inconsistent policies embodied in other legislation . . . it cannot, without more, ignore the latter."

¹⁵ As observed by the court in *Pesikoff v. Secretary of Labor*, 501 F.2d 757, 761 (D.C. Cir.), *cert. denied*, 419 U.S. 1038 (1974), Section 212(a)(14) of the INA is written "so as to set up a presumption that

(footnote continued)

Harmonization of the remedial order with federal immigration laws and policies requires elimination of the backpay award to the illegal aliens. A backpay award that treats the illegal aliens as though they had a right to remain in this country, rewards them for their violation of the INA, and encourages them to illegally reenter this country creates an untenable conflict between the NLRA and the immigration laws.

III. THE AWARD OF SIX MONTHS' BACKPAY TO THE ILLEGAL ALIENS CONSTITUTES AN IMPROPER PUNITIVE REMEDY VIOLATIVE OF SECTION 10(c) OF THE ACT.

A. Board Remedies Must Be Remedial, Not Punitive.

Section 10(c) of the Act authorizes the Board, when it has found a party guilty of an unfair labor practice, to require the party to cease and desist from such practices "and to take such affirmative action including reinstatement of employees with or without backpay, as will effectuate the policies of this [Act]." 29 U.S.C. § 160(c).¹⁶

(footnote continued)

aliens should not be permitted to enter the United States for the purpose of performing labor because of the likely harmful impact of their admission on American workers." Aliens seeking to enter the United States for the purpose of performing skilled or unskilled labor may not be admitted unless the Secretary of Labor affirmatively determines and certifies that there are not sufficient workers available at the time and place the alien wishes to be employed and that the employment of the alien will not adversely affect the wages and working conditions of similarly employed workers in the United States. 8. U.S.C. §1182(a) (14).

¹⁶ The policies which the Board is directed to effectuate were outlined by Congress in Section 1 of the Act:

It is declared to be the policy of the United States to . . . mitigate

(footnote continued)

This Court defined the limits of the Board's remedial jurisdiction in *Consolidated Edison Co., v. NLRB*, 305 U.S. 197, 235-36 (1938), stating:

We think that this authority to order affirmative action does not go so far as to confer a punitive jurisdiction enabling the Board to inflict upon the employer any penalty it may choose because he is engaged in unfair labor practices, even though the Board be of the opinion that the policies of the Act might be effectuated by such an order. The power to command affirmative action is remedial, not punitive, and is to be exercised in aid of the Board's authority to restrain violations and as a means of removing or avoiding the consequences of violation where those consequences are of a kind to thwart the purposes of the Act.¹⁷

A Board order is punitive where it is shown to be "a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act." *Virginia Electric & Power Co. v. NLRB*, 319 U.S. 533, 540 (1943).

B. The Backpay Award Is Patently Punitive.

The court of appeals acknowledged that the illegal aliens should be deemed unavailable for work and ineligible for

(footnote continued)

and eliminate . . . [obstructions to the free flow of commerce] . . . when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

29 U.S.C. §151.

¹⁷ This Court reaffirmed in *Republic Steel Corp. v. NLRB*, 311 U.S. 7, 11-12 (1940), that the Board's jurisdiction is remedial, not punitive. In that case, the Court denied enforcement of part of a Board order which required an employer to reimburse governmental agencies for wages paid under a work relief program to employees who had been discriminatorily discharged.

backpay "during any period when not lawfully entitled to be present and employed in the United States . . ." (23a). Yet, the court ordered a minimum payment of six months' backpay, contrary to its own procedure for computing backpay, to assure that Sure-Tan was subjected to some monetary liability for its actions.

This exaction represents an impermissible attempt to achieve ends other than those which effectuate the purposes of the Act. The courts and the Board have long recognized that the policies of the Act are effectuated by tolling backpay for periods when discriminatees are unavailable for work.¹⁸ Indeed, the Board, in its order denying the General Counsel's Motion for Clarification, stated that: "Discriminatees who are located but found to be unavailable for work (including unavailability because of enforced absence from the country) will have their backpay tolled accordingly." (41a).¹⁹

In *NLRB v. Local No. 2 of the United Association of Journeymen*, 360 F.2d 428, 434 (2d Cir. 1966), the court recognized that "[t]he right to backpay is not a punitive award for having been the victim of an unfair labor practice; it rests on the right to have had the work and presupposes the ability to do it." The illegal aliens in the present case had no legal right to work; their very presence in this country was unlawful. See *Ojeda-Vinales v. INS*, 523 F.2d 286 (2d Cir. 1975); *Pilapil v. INS*, 424 F.2d 6 (10th Cir.) cert. denied 400 U.S. 908 (1970)). They are therefore not entitled to backpay.

¹⁸ See, e.g., *Hale & Sons Construction*, 219 N.L.R.B. 1073, 1078-79 (1975) (employee in jail); *Gary Aircraft Corp.*, 210 N.L.R.B. 555, 557-58 (1974) (employee out of labor market); *Gifford-Hill & Co.*, 188 N.L.R.B. 337, 338 (1971) (employee in jail).

¹⁹ The Board's Casehandling Manual (Part III), § 10612, provides that: "[w]hen a discriminatee becomes unavailable gross backpay does not accrue until discriminatee becomes available again . . ."

In *Kroger Co. v. NLRB*, 401 F.2d 682, 688-89 (6th Cir. 1968), cert. denied, 395 U.S. 904 (1969), the Sixth Circuit denied enforcement to part of a Board order requiring the employer to make contributions to a voluntary profit sharing plan, where there was no basis for determining what the employees' contributions to the plan would have been in the absence of the employer's unfair labor practice. The court admonished: "We do not consider that a punitive order denominated as a remedy is called for, nor should Kroger employees be provided a 'windfall'. . . . Any effort to make such a determination would be pure speculation." *Id.* at 688-89. Similarly, in the present case, any determination of how long the illegal aliens would have remained working absent Sure-Tan's inquiry to the INS would be pure speculation, and an arbitrary award of backpay would present a windfall to the illegal aliens.

Where, as here, an arbitrary backpay award is assessed for a period that employees did not and could not work, contrary to the Board's established procedure for computing backpay, the award is patently punitive, having the same effect as a criminal fine. As observed by Judge Wood in his dissent to the Order denying Sure-Tan's Petition for Rehearing: "Much of the rationale [for the court's order] seems to be to punish the employer. Punishment of employers of illegal aliens, however, is for Congress, not for us." (38a).

Congress is presently struggling with the issue of sanctions against employers of illegal aliens in the proposed Immigration Reform and Control Act of 1983. It was improper for the court of appeals to undermine the legislative process by imposing judicially-created sanctions on Sure-Tan,²⁰ par-

²⁰ As observed by Chief Justice Burger:

[W]hen this Court rushes in to remedy what it perceives to be the failings of the political process, it deprives those processes of an opportunity to function. When the political institutions are not forced to exercise constitutionally allocated powers and responsibilities, those powers, like muscles not used, tend to atrophy.

Phyller v. Doe, 102 S. Ct. at 2414 (Burger, C. J., dissenting).

ticularly where Congress thus far has not provided punitive sanctions against violators of the NLRA²¹ or against employers of illegal aliens.²²

IV. THE NATIONAL LABOR RELATIONS ACT DOES NOT REQUIRE SURE-TAN'S REINSTATEMENT OFFER TO BE LEFT OPEN FOR FOUR YEARS, TO BE WRITTEN IN SPANISH, AND TO BE SENT IN A MANNER ALLOWING VERIFICATION OF RECEIPT.

A. A Four Year Reinstatement Period Places An Unreasonable Burden on Sure-Tan and Its Present Employees.

²¹ Congress considered and rejected a bill that would have amended Section 303 of the NLRA to permit any person who suffers financial injury through a violation of Section 8(a)(3) or 8(b)(2) of the Act to sue in a U.S. district court to recover treble the damages sustained plus legal costs and attorneys' fees. H.R. 8110, 94th Cong., 1st Sess. (1975).

²² The court's punitive six months' backpay award greatly exceeds the employer sanctions contemplated by either the House of Representatives or Senate versions of the proposed Immigration Reform and Control Act of 1983. H.R. 1510, 98th Cong., 1st Sess. (1983); S.529, 98th Cong., 1st Sess., 129 CONG. REC. 6970 (daily ed. May 18, 1983). The House bill would authorize only a warning of possible penalties and injunctive relief for future violations against first offenders. The House bill authorizes a civil fine of \$1,000 for each unauthorized alien employed for a second offense. H.R. 1510, §101 A(1). The Senate-passed bill imposes a civil penalty of \$1,000 for each unauthorized alien employed for a first offense. S. 529, § 101(a)(1). Both bills provide a six-month grace period following the effective dates of the acts during which no action would be taken against an offending employer. H.R. 1510, § 101(a)(2); S.529, § 101(a)(2).

Sure-Tan's reinstatement offers were mailed to the deported aliens on March 29, 1977 and remained open until May 1, 1977. This 30 day reinstatement period was reasonable, and far exceeded the period required by the Board in numerous other cases. For instance, the Board approved a reinstatement offer that remained open for six days in *American Enterprises, Inc.*, 200 N.L.R.B. 114 (1972). In *Woodland Supermarket*, 240 N.L.R.B. 295 (1979), the Board held that eight days was a reasonable period to hold open reinstatement offers.²³

In contrast, the court of appeals ordered Sure-Tan to leave its reinstatement offers open for four years after receipt of the offer. (31a).²⁴ The Board has never before required that a reinstatement offer be left open for such an extraordinary period of time. By requiring a four year reinstatement period, the court of appeals treats the illegal aliens with greater deference than it does employees who lawfully reside in this country. As with the backpay award, the four year reinstatement period serves to reward the illegal aliens for their violation of the immigration laws and to punish Sure-Tan for reporting them to the INS.

As observed by the court in *White Sulfur Springs Co. v. NLRB*, 316 F.2d 410, 415 (D.C. Cir. 1963), approving a reinstatement offer that remained open for only three days, "the employer certainly was entitled to know where it stood . . ." Similarly, in the present case, Sure-Tan and its present

²³ See also, *NLRB v. W. C. McQuaide, Inc.*, 552 F.2d 519, 529-30 (3rd Cir. 1977) (less than two weeks held reasonable period of time to hold open reinstatement offers); *NLRB v. Betts Baking Co.*, 428 F.2d 156, 158 (10th Cir. 1970) (eight days held reasonable); *Southern Household Products Co.*, 203 N.L.R.B. 881, 882 (1973) (ten days held reasonable).

²⁴ If the reinstatement offers, which were mailed to the employees' last known address in Mexico, are not received by the offerees, the court-ordered reinstatement period could go on indefinitely.

employees are entitled to know where they stand with respect to reinstatement of the illegal aliens. The four year reinstatement period required by the court of appeals would place Sure-Tan and its present employees in a state of limbo for an unreasonable period of time.²⁵ The thirty day acceptance period afforded in Sure-Tan's reinstatement letter was fully adequate in light of established Board precedent.²⁶ It would not serve the purposes of the NLRA or the INA to afford preferential treatment to those who violate federal immigration laws, particularly where the aliens would likely displace the American workers presently working for Sure-Tan.

B. The Requirements That The Offers Be Written In Spanish and Be Sent By Means Allowing Verification of Receipt Are Unreasonable Departures From Established Board Precedent.

The Board's Casehandling Manual (Part III) § 10528.15, provides that: "To avoid misunderstanding, the compliance officer should advise employers to make offers of reinstatement in writing and should likewise advise the discriminatees to respond thereto in writing." Nowhere in the Casehandling Manual does the Board require that written reinstatement offers be written in an employee's native language or sent in a manner allowing verification of receipt.

Certainly an employer is entitled to communicate with its employees in English, the official language of this country.

²⁵ The employees who replaced the illegal aliens are subject to dismissal if and when the alleged discriminatees become lawfully available for work. Thus, the four year reinstatement period exposes Sure-Tan's present employees to significant uncertainty with respect to seniority rights and pension benefits that might accrue during the extraordinary reinstatement period.

²⁶ Member Murphy, in her dissent to the Board's Order denying the General Counsel's Motion for Clarification, would have limited the time for acceptance of Sure-Tan's reinstatement offer to two weeks. (50-51a).

Courts have recognized that the government is not required to conduct its affairs and proceedings in languages other than English. See, e.g., *Carmona v. Sheffield*, 325 F. Supp. 1341, 1342 (N.D. Cal. 1971), *aff'd*, 475 F.2d 738 (9th Cir. 1973).²⁷ It is unfair to require Sure-Tan to communicate with its employees in Spanish, when federal and state governments are not required to do so.²⁸

In *General Iron Corp.*, 218 N.L.R.B. 770 (1975), the Board, reversing the ALJ, held that a reinstatement offer written in English was satisfactory, even though the employer knew that the discharged employees spoke only Spanish. The Board observed: "We are not aware of any case which has held that the language of the land is an inappropriate means for communicating with employees." *Id.* at 770. The Board also reversed the ALJ's holding that the reinstatement offers were invalid because they were not sent by registered mail, stating:

[T]he novel idea that offers of reinstatement must be served by registered mail, return receipt requested, is not supported by precedent. In fact, the Board recently held that service of the General Counsel's brief by ordinary mail was sufficient even though the opposing party asserted without contradiction that it had never received the brief. (citing *Pacific Grinding Wheel Co., Inc.*, 216 N.L.R.B. 529 (1975)).

Id. at 771. Following the reasoning of *General Iron Corp.*, Sure Tan's reinstatement letters were fully adequate.

This Court has recognized that "[w]hen the Board so exercises the discretion given to it by Congress, it must

²⁷ This Court recognized in *Fay v. New York*, 332 U.S. 261, 291 (1947), that a state has a right to require an "understanding of English" as a requirement for jurors.

²⁸ Congress has seen fit to require at least an elementary understanding of the English language as a condition to naturalization. 8 U.S.C. § 1423. Likewise, a federal juror must be able to "read, write, speak and understand the English language." 28 U.S.C. § 1861(2).

'disclose the basis of its order' and 'give clear indication that it has exercised the discretion with which Congress has empowered it.' " *NLRB v. Metropolitan Life Insurance Co.*, 380 U.S. 438, 443 (1965). Where the Board has reached different conclusions in prior cases, it is essential that "reasons for the decisions in and distinctions among these cases" be set forth to dispel any appearance of arbitrariness. *Id.* at 442. There is no reasonable basis for requiring Sure-Tan's reinstatement offers to be left open for four years, to be written in Spanish, and to be sent in a manner allowing verification of receipt, contrary to established Board precedent, in order to benefit individuals who violated federal immigration laws. Sure-Tan's reinstatement offers fully complied with the standards set forth in the Board's Casehandling Manual and in prior cases. Sure-Tan was entitled to rely upon these established standards, and its reinstatement offers should be upheld.

CONCLUSION

Sure-Tan's request to the INS to investigate the immigration status of its employees was not an unlawful constructive discharge. This case should therefore be remanded to the court of appeals with instructions to modify the decree of enforcement to exclude the requirement that the illegal aliens be reinstated with backpay. If this Court holds that Sure-Tan's request to the INS violated Section 8(a)(3) of the Act, the enforcement decree should be modified to exclude the backpay award in order to eliminate the fundamental conflict between the NLRA and the immigration laws, and

should be further modified to exclude the requirement that Sure-Tan send revised reinstatement offers to the aliens.

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SEP 21 1983

In the Supreme Court of the United States

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OCTOBER TERM, 1983

**SURE-TAN, INC. and SURAK LEATHER COMPANY,
PETITIONERS**

v.

NATIONAL LABOR RELATIONS BOARD

**ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SEVENTH CIRCUIT**

**BRIEF FOR
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QUESTIONS PRESENTED

1. Whether, in violation of Section 8(a)(3) and (1) of the National Labor Relations Act, the employer constructively discharged employees known by the employer to be undocumented aliens by reporting the employees to the Immigration and Naturalization Service in retaliation for their engaging in union activity, thereby causing their arrest and immediate departure from the United States.

2. Whether the remedial order in this case is appropriate.

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In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 82-945

SURE-TAN, INC. and SURAK LEATHER COMPANY,
PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

*ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

STATEMENT

1. Petitioners are leather processing firms located in Chicago, Illinois. For purposes of the National Labor Relations Act ("NLRA"), they are a single, integrated employer. In July 1976, the Chicago Leather Workers Union, Local 431, Amalgamated Meatcutters and Butcher Workmen of North America (the "Union") began to organize petitioners' employees. At that time, petitioners employed about 11 workers, most of whom were Mexican nationals present in the United States without visas or immigration papers authorizing them to work (Pet. App. 2a, 67a). In response to the organizing campaign, petitioners coercively interrogated employees about their union sentiments and activities and those of other employees, subjected them to profane verbal abuse, threatened that petitioners would reduce work opportunities if the employees voted for the Union, and promised more work if

they did not support the Union (Pet. App. 3a-6a, 69a-71a, 73a-74a). The Union prevailed in a Board election conducted on December 10, 1976 (Pet. App. 2a, 68a). *Sure-Tan, Inc. & Surak Leather Co.*, 231 N.L.R.B. 138 (1977), enforced, 583 F.2d 355 (7th Cir. 1978) ("*Sure-Tan I*").

Two hours after the election, petitioners' president, John Surak, addressed a group of employees, including three of the undocumented aliens involved here. Surak told the employees that they were not his friends or "amigos," asked why they had voted for the Union, cursed them, and asked whether they had proper immigration papers. The employees replied that they and the other Mexican employees did not have such papers. Later that day, Surak threatened another employee that petitioners would go out of business as a result of the election (Pet. App. 4a, 70a).

Petitioners filed objections to the election on the ground, *inter alia*, that six of the seven eligible voters were undocumented aliens. *Sure-Tan I, supra*, 231 N.L.R.B. at 138-139. John Surak executed an affidavit on January 10, 1977 in connection with those objections in which he stated that he had been informed several months before the election that "these men were illegally here" (Pet. App. 11a, 72a n.3). In a decision dated January 17, 1977, the Acting Regional Director overruled petitioners' objections and certified the Union as the bargaining representative for petitioners' employees. Petitioners received notice of this decision on January 19, 1977.

On the next day, January 20, 1977, John Surak sent a letter to the Immigration and Naturalization Service ("INS") requesting that the INS check the status of a number of petitioners' employees and that INS give its attention to the matter "as soon as possible" (Pet. App. 8a-9a, 68a-69a). On February 18, 1977, as a result of Surak's letter, INS agents visited petitioners' plant, determined that five employees were in the United States in violation of the immigration laws, and arrested them (Pet. App. 9a, 69a, 75a). Each of the five employees exe-

cuted INS Form I-274, thereby acknowledging illegal presence in the United States and accepting INS's grant of voluntary departure in lieu of deportation (*id.* at 9a-10a). By the end of the day, the five employees had been placed on a bus bound for El Paso, Texas, from where they were to return to Mexico (Pet. App. 10a, 69a).

On March 29, 1977, petitioners sent letters in English by regular mail to the five employees at their last known addresses in Mexico offering to reinstate them, provided that doing so would "not subject Sure-Tan, Inc. to any violations of United States immigration laws." The letters further stated that the offer would remain open until May 1, 1977. There is no evidence that any of the letters was actually received (Pet. App. 20a, 80a).

2. Petitioners refused to bargain with the Union after it was certified as the bargaining representative. In unfair labor practice proceedings not involved here, the Board found that petitioners' refusal to bargain violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. 158(a)(5) and (1). *Sure-Tan I, supra*, 231 N.L.R.B. at 140-141. The court of appeals enforced the Board's order, rejecting petitioners' contention that the certification and bargaining order were invalid because six of the seven employees eligible to vote in the election were aliens who were residing and working in the United States without authorization and who had since departed. *NLRB v. Sure-Tan, Inc.*, 583 F.2d 355 (7th Cir. 1978). The court observed that the term "employee" is defined broadly in Section 2(3) of the Act, 29 U.S.C. 152(3), and that the Board's interpretation of the term to include undocumented aliens is entitled to great weight and should be followed where, as here, there are no compelling indications that it is wrong. 583 F.2d at 358-359.

The court also held that the certification and bargaining order did not conflict with the Immigration and Nationality Act ("INA"). It observed that petitioners had a choice whether to hire illegal aliens in the first place, and to hold that a company could avoid certification on the basis of the employees' immigration status would

"giv[e] employers an extra incentive to hire aliens and thus would be defeating the goals of the immigration laws" (583 F.2d at 360). The court found the "obvious possibility" to be "that a company would hire illegal aliens without informing the Immigration and Naturalization Service and without seeking certification of the aliens from the Secretary of Labor, as more responsible employers frequently do * * *,¹ knowing that if the aliens successfully unionize they could then be reported to the Immigration and Naturalization Service and deported." *Ibid.* (footnote and citation omitted). The court concluded that in view of petitioners' prior knowledge of the employees' immigration status and petitioners' failure to seek approval from the Secretary of Labor for them to work, "it ill becomes [petitioners] to argue after losing the election that certification would conflict with the immigration laws" (*id.* at 360).

3. a. The instant case arises out of a second unfair labor practice proceeding against petitioners. The Board, adopting the findings and conclusions of the Administrative Law Judge ("ALJ"), found that petitioners violated Section 8(a)(1) of the Act by: (i) threatening employees with less work if they supported the Union and promising more work if they did not; (ii) interrogating employees about their Union sentiments; (iii) threatening the employees immediately after the election to notify the INS because they had supported the Union; and (iv) threatening to go out of business because the Union won the election (Pet. App. 61a-62a, 73a-74a, 77a).

The Board also held that petitioners had violated Section 8(a)(3) and (1) when, "with full knowledge that the employees in question had no work permits," they requested the INS to investigate the employees' status "solely because the employees supported the Union" (Pet. App. 62a). The Board affirmed the ALJ's finding that "the discriminatees' subsequent deportation was the proxi-

¹ See Sections 212(a)(14), 101(a)(15)(H), and 214(c) of the Immigration and Nationality Act, 8 U.S.C. 1182(a)(14), 1101(a)(15)(H), and 1184(c); 20 C.F.R. Parts 655 and 656.

mate result of [petitioners'] discriminatorily motivated action * * * and constitutes a constructive discharge" (Pet. App. 61a-62a, 74a).

b. With respect to the remedy, the Board ordered petitioners to cease and desist from discouraging membership in or support of the Union by interrogating employees about their Union sympathies, threatening them with less work if they support the Union and more work if they do not, threatening to notify the INS of employees' status because of their support of the Union, and actually notifying the INS of employees' status because of that support and thereby causing their constructive discharge (Pet. App. 64a, 82a). The Board did not, however, adopt the ALJ's recommendation with respect to reinstatement and backpay for the five alien employees who the Board found to have been constructively discharged.

The ALJ had concluded that reinstatement would be an appropriate remedy if the employees could lawfully work in the United States (Pet. App. 79a-80a). The ALJ found, however, that petitioners' March 29, 1977 letter offering the discriminatees reinstatement was inadequate because it gave them only "20 days or less to initiate procedures to re-enter the United States on work permits or other valid basis" (Pet. App. 80a). The ALJ recommended instead that they be allowed six months to return and accept reinstatement (*id.* at 79a-80a). The ALJ also found that because the letters were not sent by registered mail with return receipts requested, there was no evidence that the offers had been received (*ibid.*). The ALJ declined to recommend an award of backpay because liability for backpay ordinarily is tolled during the period that discharged employees are unavailable for work (Pet. App. 80a-81a).

The Board agreed with the ALJ that reinstatement is an appropriate remedy. The Board also found petitioners' March 29, 1977 letter offering reinstatement to have been deficient, but on a ground other than those identified by the ALJ. It found that the letter was not unconditional,

because it offered reinstatement on the condition that "re-employment shall not subject Sure-Tan, Inc. to any violations of United States immigration laws" (Pet. App. 20a).² The Board also found that the ALJ's analysis of the remedial issue was "unnecessarily speculative." The Board explained that the ALJ's recommendation that the offer of reinstatement be kept open for six months and his failure to recommend an award of backpay were premised upon the discriminatees' unavailability for work, even though there was no evidence that the employees had not actually returned to the United States. The Board therefore ordered the conventional remedy of reinstatement and backpay, with matters pertaining to the availability of the employees to be resolved in compliance proceedings (Pet. App. 63a).³

4. a. The court of appeals upheld the Board's finding of violations of Section 8(a)(1) of the Act arising out of petitioners' threatening and interrogation of employees, including their threat to report alien employees to the

² The Board therefore did not consider the ALJ's conclusion that the offer of reinstatement was deficient because the period for acceptance was too short and because there was good reason to question the usual presumption that the offer had been received by the discriminatees (Pet. App. 20a).

³ The General Counsel of the Board then filed a motion to "clarify" the Board's order to make certain that any offer of reinstatement was subject to the condition that the discriminatees lawfully reenter the country with appropriate working permits and to limit the accrual of backpay to those periods, if any, during which the discriminatees were lawfully present in the country and properly documented for employment (Pet. App. 59a-60a). The Board, two Members dissenting, denied the motion (*id.* at 40a-52a). The Board found no reason at that stage to depart from its normal compliance procedures (*id.* at 44a), under which "[t]he backpay period runs from the discriminatory loss of employment to the bona fide reinstatement offer"; the accrual of backpay would be tolled during the time that employees were unavailable for work; and backpay would be placed in an escrow account "for the normal 2-year period" if the discriminatees were not immediately located (Pet. App. 41a-42a).

INS (Pet. App. 3a-6a). Petitioners do not challenge the decision of the court of appeals in this respect.

The court also upheld the Board's finding that petitioners were motivated by anti-union animus in reporting the employees to INS and violated Section 8(a) (3) and (1) in doing so (Pet. App. 8a-15a). The court found the element of anti-union animus to be "flagrantly met in this case," because "[t]he record is replete with examples of [petitioners'] blatantly illegal course of conduct to discourage its employees from supporting the Union" (Pet. App. 14a (footnote omitted); see also *id.* at 10a-12a). The court held that "[b]y putting the INS on notice of these alien employees when it knew of their illegal status, [petitioners] took action which was the proximate cause of their departure" (Pet. App. 12a).

The court also rejected petitioners' contention that they were legally obligated to disclose the presence of the aliens to the INS, concluding that no provision of the INA imposes such a legal duty. The court recognized that an employer nevertheless ordinarily should notify the INS if he suspects that his employees are in the United States without authorization, but the court concluded that "an employer has no right to rely on a 'moral obligation' to report illegal aliens (of which he has been previously oblivious) merely to sanctify an otherwise unjustifiable violation of Section 8(a) (3)" (Pet. App. 13a).

b. The court found the usual remedy of reinstatement and backpay appropriate in these circumstances. In the court's view, it would be anomalous to hold that undocumented aliens are employees covered by the Act but then to refuse effective remedies. The court also noted that the rights of both alien and non-alien employees were at issue because discrimination against the alien employees undermined the Union's support during the crucial period immediately after certification. Thus, the court concluded that reinstatement and backpay would vindicate the policies of the NLRA and deter similar conduct in the future (Pet. App. 19a). The court did, however, modify the Board's remedial order in several respects.

The court first concluded that reinstatement would be proper only if the discriminatees are legally present and free to be employed in the United States when they present themselves for reinstatement (Pet. App. 22a). The court also disagreed with the Board that petitioners' March 29, 1977 offer of reinstatement was not unconditional because it was contingent upon petitioners' not violating the immigration laws. The court observed that this condition was not actually a legal impediment to reinstatement, since the INA does not prohibit an employer from hiring an illegal alien, and concluded that in any event this condition would have been understood by the recipient as imposing the reasonable condition that he lawfully re-enter the United States (Pet. App. 21a-22a). The court held, however, that the reinstatement offers were deficient on other grounds: because they did not allow the employees a reasonable time to make arrangements for a legal entry, were not delivered in a manner allowing verification of receipt, and were not written in Spanish (Pet. App. 22a). The court held that the reinstatement offers should be left open for a period of four years (*ibid.*).

The court of appeals also modified the Board's order to make clear that in computing backpay, discriminatees would be deemed unavailable for work during any period in which they were not lawfully entitled to be present and work in the United States (Pet. App. 23a). The court observed, however, that in this case the discriminatees might not have been lawfully available for work at any time prior to the new offer of reinstatement and that they therefore might receive no backpay under the usual rules. The court expressed the view that in these circumstances, an award of some minimum amount of backpay notwithstanding the employees' unavailability—to account in some measure for the period the aliens would have remained in the United States if they had not been reported to the INS for discriminatory reasons—would better effectuate the purposes of the Act. The court believed that six months' backpay would be the minimum amount appropriate for this purpose, and suggested that the

Board consider that remedy (Pet. App. 24a). The Board accepted the court's suggestion in this particular case, although in doing so it did not purport to articulate a remedial policy for such cases generally.⁴ The backpay award is subject to setoffs for other earnings during the six-month period (Pet. App. 28a).⁵

SUMMARY OF ARGUMENT

I. The application of the National Labor Relations Act (NLRA) to unfair labor practices committed against undocumented aliens is consistent with the terms and furthers the purposes of both the NLRA and the Immigration and Nationality Act ("INA"). The term "employee" is defined broadly in Section 2(3) of the NLRA to include "any employee," with exceptions not relevant here, and nothing suggests that an employee's status under the immigration laws removes him from coverage. Moreover, to exclude undocumented aliens from the right to participate in union activities free of intimidation by the employer would create a subclass of employees in an employer's work force who have no protected stake in the collective goals of the employees. This would substantially undermine the unified strength Congress found necessary for collective bargaining and resulting industrial peace and would adversely affect the wages and working conditions of citizens and lawfully resident aliens.

This Court concluded in *De Canas v. Bica*, 424 U.S. 351, 360 (1976), that the employment of undocumented aliens is at most a "peripheral concern" of the INA. For example, although it is unlawful under 8 U.S.C. 1324

⁴ The Board did not issue a new decision regarding the six-month minimum backpay award suggested by the court, but the Board's proposed judgment order (Pet. App. 30a-35a) was intended to incorporate the six-month minimum. The Board's proposed order, however, left the court "uncertain whether the Board [had] adopted [the] suggestion" (*id.* at 28a), and the court modified the judgment to make it clear that the discriminatees are entitled to a minimum award of six months' backpay (*id.* at 29a).

⁵ A petition for rehearing with suggestion for rehearing en banc was denied, with three judges dissenting (Pet. App. 36a-39a).

(a) (3) knowingly to harbor an illegal alien, employment is expressly excluded from that prohibition. Moreover, the provisions of the INA that provide for the exclusion of aliens and impose criminal sanctions for their conduct apply principally at the time of entry and likewise do not focus specifically on employment. Application of the NLRA to undocumented aliens therefore is not inconsistent with the INA. To the contrary, enforcement of the NLRA in this setting furthers the purposes of the INA's labor certification protections by creating a disincentive for employers to hire undocumented aliens on substandard terms that would adversely affect the job opportunities and wages and working conditions of citizens and lawfully resident aliens.

II. Petitioners constructively discharged the undocumented alien employees in violation of Section 8(a) (3) and (1) of the NLRA by reporting them to the INS in retaliation for their union activities, which caused them to be arrested and depart the country. Petitioners clearly would have been prohibited from firing the employees outright for this reason, and it could not accomplish the same result indirectly by reporting them to the INS.

The finding of an unfair labor practice in these circumstances is fully consistent with the INA. When Congress chose not to make it unlawful for employers to hire undocumented aliens, it obviously did not anticipate that employers who do so would report the aliens to the INS. In fact, Congress rejected proposals to require such reporting. Thus, the governmental interest in receiving information about violations of the INA applies with less force in the case of reporting by employers who knowingly hire undocumented aliens. On the other hand, the purposes of the NLRA apply with particular force in this setting, because the undocumented aliens are especially vulnerable to exploitation by their employers, which in turn adversely affects the employer's other employees. It also is relevant that petitioners themselves facilitated the undocumented alien employees' unlawful residence by continuing to employ them.

III. The remedial order requiring petitioners to pay a minimum of six months' backpay to the discharged employees effectuates the purposes of the NLRA. Backpay is a standard remedy when employees are unlawfully discharged. The award in this case reflects the fact that the employees would have remained in petitioners' employ for some time if they had not been reported to the INS. Because employment of the aliens was not unlawful under the INA and petitioners took advantage of the exemption in the INA by employing them, petitioners cannot be heard to contend that employment of the discriminatees was so contrary to public policy that petitioners cannot be held liable for constructively discharging them for retaliatory reasons. The Board's inability to provide an effective remedy in these circumstances would encourage similar acts in the future and undermine the rights of lawfully resident employees.

IV. The requirements that petitioners' offers of reinstatement be written in Spanish and provide for verification of receipt are reasonably calculated to ensure that the offers will be effectively communicated to the discriminatees in Mexico. The requirement that the discriminatees be allowed four years within which to return to accept reinstatement also is reasonable, in light of the delays that applicants from Mexico face in obtaining immigrant visas.

ARGUMENT

Petitioners do not dispute that they are engaged in commerce and that their labor practices therefore are subject to the NLRA.⁶ Nor do petitioners take issue with the conclusion by the Board and court of appeals that the undocumented aliens they employed are "employees" within the meaning of the Act⁷ and that it therefore was illegal for petitioners to "interfere with, restrain, or coerce" those employees in the exercise of their rights under the

⁶ Section 2(6) and (7), 29 U.S.C. 152(6) and (7).

⁷ Section 2(3), 29 U.S.C. 152(3). See *Sure-Tan I*, *supra*, 583 F.2d at 358-359.

Act^{*} or to discourage their membership in a labor organization "by discrimination in regard to hire or tenure of employment or any term or condition of employment."⁹ Accordingly, petitioners have not sought review of the Board's holding, affirmed by the court of appeals, that they violated Section 8(a) (1) by threatening and interrogating those employees with regard to their Union sentiments and activities, including threatening to report them to the INS in retaliation for their Union activities.

Petitioners also do not challenge the Board's finding that when they followed through on their threat to report the undocumented alien employees to the INS, they were motivated solely by anti-union animus (Pet. App. 62a; see Pet. Br. 19)—a fact the court of appeals found was "flagrantly" present in this case, in light of petitioners' "blatantly illegal course of conduct to discourage its employees from supporting the Union" (Pet. App. 14a). Petitioners nevertheless contend that their reporting of the employees to the INS in retaliation for their Union activities did not violate the Act and that the employees' loss of their jobs as a result is none of petitioners' concern. This contention should be rejected.

Although petitioners do not specifically dispute that the five aliens involved here were their "employees" within the meaning of the NLRA notwithstanding their status under the INA, the principal theme of petitioners' argument nevertheless is that the court of appeals' decision is inconsistent with the INA. In order to demonstrate that no such inconsistency exists, we shall begin with a discussion of the coverage of undocumented aliens under the NLRA and the broader question of the proper accommodation of the NLRA and the INA in this setting.

^{*} Section 8(a) (1), 29 U.S.C. 158(a) (1).

⁹ Section 8(a) (3), 29 U.S.C. 158(a) (3).

I. THE APPLICATION OF THE NATIONAL LABOR RELATIONS ACT TO UNFAIR LABOR PRACTICES COMMITTED AGAINST ALIENS WHO ARE PRESENT IN THE UNITED STATES IN VIOLATION OF THE IMMIGRATION AND NATIONALITY ACT IS CONSISTENT WITH THE TERMS OF BOTH ACTS AND SUBSTANTIALLY FURTHERS THE POLICIES OF EACH

The Board consistently has construed the NLRA as applying to undocumented aliens (see page 17, *infra*), and the only two courts of appeals that have considered the question have agreed with the Board's interpretation. See *Sure-Tan I*, *supra*, 583 F.2d at 359; *NLRB v. Apollo Tire Co.*, 604 F.2d 1180, 1182-1183 (9th Cir. 1979). This interpretation of the Act is clearly correct. There is no basis for concluding that an individual who occupies the position of an employee is excluded from coverage under the NLRA because of his status under the INA. To the contrary, a holding that undocumented aliens are not covered by the NLRA would create an incentive for an employer to hire such aliens to avoid his obligations under the NLRA and thereby encourage the illegal entry of aliens in contravention of the INA.

A. The Terms And Policies Of The National Labor Relations Act Fully Support The Coverage Of Undocumented Aliens

Section 2(3) of the NLRA broadly provides that "[t]he term 'employee' shall include *any* employee" (29 U.S.C. 152(3); emphasis added), subject only to specifically enumerated exceptions for agricultural laborers, domestic workers, individuals employed by their spouses or parents or as independent contractors, supervisors, and individuals employed by a person who is not an employer under the Act. *Ibid.* There is no suggestion that the five aliens involved here fall within any of these exceptions. Nor is there any reason to believe that Congress intended to

fashion an implied exception for undocumented aliens.¹⁰ The express enumeration of employees not covered suggests that other exclusions were not contemplated.¹¹

Moreover, this Court has made clear that the statutory term employee "must be understood with reference to the purpose of the Act and the facts involved in the economic relationship" and that "its applicability is to be determined broadly, in doubtful situations, by underlying economic facts rather than technically and exclusively by previously established legal classifications." *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111, 129 (1944) (footnote omitted). There is nothing in the "economic relationship" between an undocumented alien and his employer that distinguishes the alien from other employees who concededly are covered by the Act; the alien's status under the INA is essentially irrelevant to that relationship.¹²

The "purpose of the Act" referred to in *Hearst Publications* is "to avert the 'substantial obstructions to the free flow of commerce' which result from 'strikes and other forms of industrial strife or unrest' by eliminating the causes of that unrest" (322 U.S. at 126, quoting NLRA, Section 1, 29 U.S.C. 151). Congress determined that this purpose would be furthered by encouraging collective bargaining by employees and "by 'protecting the exercise * * * of full freedom of association, self-organization, and desig-

¹⁰ A bill was introduced in the House of Representatives in 1979 to exclude from the definition of "employee" any "alien not lawfully admitted for permanent residence or who has not been authorized by the Attorney General to accept employment." H.R. 2442, 96th Cong., 1st Sess. (1979). No action was taken on the bill.

¹¹ Cf. *State Bank of India*, 229 N.L.R.B. 838, 841 (1977) (asserting jurisdiction over a foreign government's commercial activities in the United States: "there is no basis for believing that the Act was intended to exclude any employees in our country whose employer in this country is an 'employer' engaged in commerce within the meaning of the Act").

¹² Compare *NLRB v. Hendricks County Rural Electric Membership Corp.*, 454 U.S. 170, 179, 190 (1981); *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 278-279, 281-282 (1974).

nation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.' " 322 U.S. at 126. Congress also determined that the inequality of bargaining power of employees who do not have such rights "tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries." 29 U.S.C. 151. See *Sears, Roebuck & Co. v. Carpenters*, 436 U.S. 180, 190 (1978).

The purposes Congress sought to advance clearly are furthered by the Board's construction of the Act as covering undocumented aliens. The exclusion of such aliens from union representation and from the right to participate in union activities free of intimidation by the employer would create a subclass of workers within an employer's labor force who often would be indistinguishable from other employees in terms of the work they perform and their relationship with the employer, but who nevertheless would have no protected stake in the collective goals of their co-workers. This result would destroy the unified strength Congress found to be necessary for effective collective bargaining and resulting industrial peace. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 33 (1937); Note, *Retaliatory Reporting of Illegal Alien Employees: Remedying the Labor-Immigration Conflict*, 80 Colum. L. Rev. 1296, 1298-1299 (1980). Moreover, if an employer were free to threaten and coerce the undocumented aliens among his employees, he could create an atmosphere of intimidation in the workplace generally that would undermine the exercise of associational rights even by those employees who are lawfully present in the United States.

These are very real concerns. This Court has noted the susceptibility of undocumented aliens to exploitation by employers. *Plyler v. Doe*, 457 U.S. 202, 219 & n.18 (1982); *United States v. Brignoni-Ponce*, 422 U.S. 873,

879 (1975).¹³ And with particular relevance to the statutory goals in Section 1 of the NLRA, the Court has observed that "acceptance by illegal aliens of jobs on substandard terms as to wages and working conditions can seriously depress wage scales and working conditions of citizens and legally admitted aliens; and employment of illegal aliens under such conditions can diminish the effectiveness of labor unions." *De Canas v. Bica*, 424 U.S. 351, 356-357 (1976).¹⁴ The policies of the NLRA there-

¹³ This Court's observations are supported by a broad consensus of others who have studied the problem that some employers prefer to hire undocumented aliens in order to maintain an "exploitable" workforce unlikely to protest substandard wages, benefits and working conditions. See H.R. Rep. No. 98-115 (Pt. 1), 98th Cong., 1st Sess. 32-33, 37 (1983); *id.* (Pt. 2) at 33, 36; Sehgal & Vialet, *Documenting the Undocumented*, 103 Monthly Lab. Rev. No. 10, at 20 (October 1980); U.S. Domestic Council Committee on Illegal Aliens, *Preliminary Report* 148, 159-160 (December 1976); Note, *supra*, 80 Colum. L. Rev. at 1299; Kutchins & Tweedy, *No Two Ways About It: Employer Sanctions Versus Labor Law Protections for Undocumented Workers*, 5 Ind. Rel. Law J. 339, 360, 368-369 (1983); U.S. Dep't of Labor, Research & Development Contract No. 20-11-74-21, *The Characteristics and Role of Illegal Aliens in the U.S. Labor Market: An Exploratory Study* 164 (1976) (hereinafter "*Exploratory Study*"); *Immigration Reform and Control Act of 1982: Joint Hearings on H.R. 5872 and S. 2222 Before the House and Senate Comms. on the Judiciary*, 97th Cong., 2d Sess. 700-701 (1982) (hereinafter "*Joint Hearings*"). Accordingly, strict enforcement of protective labor legislation has been advocated as a way to curtail job opportunities for undocumented workers. See Statement of President Reagan announcing establishment of the Special Targeted Enforcement Program (STEP) for the Fair Labor Standards Act, 17 Weekly Comp. Pres. Doc. 829 (July 30, 1981); S. Rep. No. 97-485, 97th Cong., 2d Sess. 24 (1982); Dep't of Labor, *Field Operations Handbook* ¶ 52Z00 (Dec. 28, 1981); Select Commission on Immigration and Refugee Policy, *Final Report: U.S. Immigration Policy and the National Interest*, 97th Cong., 1st Sess. 70 (1981); *Exploratory Study*, *supra*, at 173-174; *Joint Hearings*, *supra*, at 211.

¹⁴ See also, *e.g.*, H.R. Rep. No. 98-115 (Pt. 1), *supra*, at 32-33; *id.* (Pt. 2) at 33; S. Rep. No. 97-485, 97th Cong., 2d Sess. 5 (1982); H.R. Rep. No. 94-506, 94th Cong., 1st Sess. 6-8, 10 (1975); H.R. Rep.

fore strongly support including undocumented aliens within the coverage of the Act. This has been the Board's consistent view. The Board has included undocumented aliens in bargaining units,¹⁵ and has found violations of the Act in the discriminatory discharge of such workers¹⁶ and threats of deportation directed at them for engaging in union activity¹⁷ or for testifying in Board proceedings.¹⁸

B. Application Of The National Labor Relations Act To Undocumented Aliens Is Consistent With And Furthers The Purposes Of The Immigration And Nationality Act

The application of the NLRA to undocumented aliens does not conflict with the provisions of the INA and in fact furthers the policies of that Act by removing incentives for employers to hire illegal aliens. As this Court observed in *De Canas v. Bica*, "[t]he central concern of the INA is with the terms and conditions of admission to the country and the subsequent treatment of aliens lawfully in the country," and the INA "cannot be said to draw in the employment of illegal aliens as 'plainly within * * * [that] central aim of federal regulation.'" 424 U.S. at 359, quoting *San Diego Unions v. Garmon*, 359 U.S. 236, 244 (1959) (second brackets in *De Canas* opinion; footnote omitted). The Court in *De Canas* instead found in the INA "at best evidence of a peripheral concern with employment of illegal entrants" (424 U.S. at 360; footnote omitted).

No. 93-108, 93d Cong., 1st Sess. 7-8, 15-16 (1973); H.R. Rep. No. 92-1366, 92d Cong., 2d Sess. 3-4 (1972).

¹⁵ *Duke City Lumber Co.*, 251 N.L.R.B. 53, 54 (1980); *Sure-Tan I*, *supra*; *Lawrence Rigging, Inc.*, 202 N.L.R.B. 1094, 1095 (1973).

¹⁶ See, e.g., *Apollo Tire, Inc.*, 236 N.L.R.B. 1627 (1978), enforced, 604 F.2d 1180, 1182-1183 (9th Cir. 1979); *Amay's Bakery & Noodle Co.*, 227 N.L.R.B. 214 (1976).

¹⁷ See, e.g., *Hasa Chemical, Inc.*, 235 N.L.R.B. 903, 906 (1978).

¹⁸ *John Dory Boat Works*, 229 N.L.R.B. 844, 851-852, 853 (1977).

1. The INA does not make it unlawful for an employer to hire an alien who is present or working in the United States without authorization. Under 8 U.S.C. 1324(a)(3), it is unlawful for any person knowingly to conceal, harbor, or shield from detection any alien not duly admitted or lawfully entitled to enter or reside in the United States. However, a proviso to 8 U.S.C. 1324(a) states that "employment (including the usual and normal practices incident to employment) shall not be deemed to constitute harboring." See *De Canas v. Bica*, *supra*, 424 U.S. at 360 & n.9. Thus, on its face, the INA does not address the subject of employment of illegal aliens. The legislative history reveals that this choice was carefully considered.

In 1952, before the INA was passed, Congress enacted special legislation to strengthen then-existing law designed to assist in preventing aliens from entering or remaining in the United States illegally. See Act of Mar. 20, 1952, ch. 108, 66 Stat. 26.¹⁹ As reported by the Senate Judiciary Committee, the relevant provisions of the bill were the same as those now contained in 8 U.S.C. 1324(a), discussed above. However, on the Senate floor, Senator Douglas proposed an amendment that would have imposed criminal sanctions on an employer who knowingly hired illegal aliens (98 Cong. Rec. 798, 803 (1952)). The proposed amendment was extensively debated. *Id.* at 798-800, 802-811. Proponents contended that the proviso in the committee bill exempting employment of illegal aliens created a loophole that would encourage illegal immigration and lead to exploitation,²⁰ and opponents con-

¹⁹ The 1952 Act amended Section 8 of the Immigration Act of 1917 (39 Stat. 880, 8 U.S.C. (1946 ed.) 144) in response to this Court's holding in *United States v. Evans*, 383 U.S. 483 (1948), that Section 8 did not make harboring of illegal aliens a punishable offense. See S. Rep. No. 1145, 82d Cong., 2d Sess. 2 (1952).

²⁰ See 98 Cong. Rec. 794, 804, 806-807 (1952) (remarks of Sen. Lehman); *id.* at 798, 803-804, 812 (remarks of Sen. Douglas); *id.* at 798-799, 812 (remarks of Sen. Humphrey); *id.* at 805-806 (remarks of Sen. Cordon).

tended that it would be wrong to punish employers who "were used to a long practice of carelessness" with regard to illegal entrants (*id.* at 794 (remarks of Sen. Kilgore)), could not find the necessary labor, and may not be able to identify illegal aliens among their workers.²¹ The amendment was defeated by a vote of 69-12. *Id.* at 811. The bill was enacted with the exemption for employment (66 Stat. 26),²² and the exemption was incorporated into the INA later in 1952 without further debate.²³

Thus, the exemption of employment from the prohibition against harboring in 8 U.S.C. 1324(a) is the product of a considered congressional judgment not to make it unlawful for an employer to hire an alien who is present in the United States in violation of the immigration laws. Since, from the employer's perspective, the employment relationship with undocumented aliens is not illegal under federal law, there is no basis for concluding that the application of the NLRA to the employer's labor practices insofar as they affect such aliens is in any way inconsistent with the INA. In other words, the employer cannot have it both ways, freely accepting the work of aliens who are present or working in violation

²¹ See 98 Cong. Rec. 794, 807 (1952) (remarks of Sen. Kilgore); *id.* at 795 (remarks of Sen. Chavez); *id.* at 796 (remarks of Sen. Connally); *id.* at 798 (remarks of Sen. McFarland); *id.* at 799-800, 809 (remarks of Sen. Magnuson); *id.* at 803 (remarks of Sen. Knowland); *id.* at 805 (remarks of Sen. Langer); *id.* at 806 (remarks of Sen. Welker); *id.* at 808 (remarks of Sen. McClellan); *ibid.* (remarks of Sen. Stennis); *id.* at 812 (remarks of Sen. Eastland).

²² Although an amendment similar to that proposed by Senator Douglas was not offered in the House of Representatives, the issue of the employment of illegal aliens was debated in the House. See 98 Cong. Rec. 1348 (1952) (remarks of Rep. Celler); *id.* at 1351 (remarks of Rep. Fernandez); *id.* at 1352 (remarks of Rep. Fisher); *id.* at 1415-1416 (remarks of Rep. Fisher). Moreover, in the previous Session, the House had successfully resisted passage of a similar criminal prohibition. See page 33, *infra*.

²³ See 98 Cong. Rec. 4400, 5757 (1952).

of the INA and yet ignoring applicable laws governing his dealings with his employees generally.

2. To be sure, the INA does impose restrictions on aliens. But these provisions likewise do not directly address the employment relationship between an undocumented alien and his employer. In 8 U.S.C. 1182(a), Congress has established numerous qualifications for the admission of aliens, providing for the exclusion of aliens who are ill or insane, drug addicts, convicted criminals, paupers, subversives, etc. Among those excluded are aliens seeking to perform skilled or unskilled labor, unless the Secretary of Labor has certified that there are insufficient workers in the United States who are able, willing, qualified and available for the work and "the employment of such aliens will not adversely affect the wages and working conditions of the workers in the United States similarly employed." 8 U.S.C. 1182(a)(14).²⁴ The INA also permits the admission of aliens as nonimmigrants to perform temporary services or labor only "if unemployed persons capable of performing such service or labor cannot be found in the country" (8 U.S.C. 1101(a)(15)(H)(ii)).

These restrictions, however, address the matter of an alien's employment in the United States principally as of the time the alien seeks admission, by providing for the exclusion of aliens as immigrants unless they meet or are exempt from the requirements of 8 U.S.C. 1182(a)(14) and by barring nonimmigrants other than those covered by 8 U.S.C. 1101(a)(15)(H) from working. Similarly, the criminal provision of the INA generally applicable to aliens (8 U.S.C. 1325) pertains only to con-

²⁴ This restriction is applicable to immigrants in the third and sixth preferences—which include aliens seeking to enter to work—and nonpreference aliens. 8 U.S.C. 1182(a)(14), 1153(a)(3), (6) and (7). However, because most immigrants enter under the family unification provisions of the Act, to which the labor certification requirement is inapplicable, that requirement provides limited protection against competition from foreign labor. See *Developments in the Law—Immigration Policy and the Rights of Aliens*, 96 Harv. L. Rev. 1286, 1348 (1983).

duct at the time of entry. That Section makes it a criminal offense for an alien to enter at other than a designated location, to elude inspection, or to obtain entry by a false or misleading statement or concealment of a material fact. This provision does not focus specifically on the alien's subsequent employment in the United States, and Congress has not made it a separate criminal offense for an alien to accept employment without authorization after he has entered the United States.²⁵

Aliens who entered the United States without inspection and nonimmigrant aliens who were duly admitted but fail to maintain their status may be deported. 8 U.S.C. 1251(a) (2) and (9). However, these provisions and the other grounds for deportation likewise do not focus specifically on the question of the alien's employment in the United States.²⁶ Furthermore, the remedy of deportation operates *prospectively* by removing the alien from the resident population. Deportation does not erase the fact of the alien's prior presence in the United States or address the various consequences of that pres-

²⁵ In 1973, when the House Judiciary Subcommittee was considering an employer sanctions bill, it deleted a provision to impose criminal sanctions on the undocumented alien who accepts a job because the Subcommittee did not want to punish a person who worked as a result of his need for a job. See 119 Cong. Rec. 14184 (remarks of Rep. Dennis). Under 8 U.S.C. 1326, if an alien was once arrested or excluded and deported and *thereafter* enters, attempts to enter, or is found in the United States, he is subject to criminal penalties unless the Attorney General has expressly consented to his reapplication. However, as the court of appeals observed (Pet. App. 17a), because the aliens in this case accepted voluntary departure status in lieu of deportation, they are not subject to the separate prohibition in 8 U.S.C. 1326.

²⁶ Of course, unauthorized employment is one of the grounds on which a nonimmigrant may be found to have failed to maintain his status and thus subject to deportation under 8 U.S.C. 1251(a) (9). Also, in 1976, Congress amended Section 245 of the Act to make a non-immigrant alien who accepts unauthorized employment ineligible for adjustment of his status to that of a permanent resident alien. See 8 U.S.C. 1255(c). Congress has not yet attached any other consequences to such employment, however.

ence. There accordingly is no inconsistency with these provisions of the INA if the NLRA is applied to an employment relationship entered into by an undocumented alien prior to the execution of the statutory remedy of deportation.

3. In a broader sense, of course, the INA may be said to embody a policy of protecting American workers, not only through the specific work-related provisions of 8 U.S.C. 1101(a)(15)(H) and 1182(a)(14), but in its overall limitations on the number of aliens who may enter the United States and thereby be lawfully available for work. Moreover, to the extent aliens are able to obtain employment in the United States, even if not at the expense of domestic workers, there is an incentive for aliens to enter the United States in violation of the immigration laws generally. As we explain below (see pages 23-25, 30-36, *infra*), application of the NLRA to an employer's unfair labor practices committed against undocumented aliens is consistent with these principles and substantially furthers the policies of the INA.

Even if some conflict were perceived, however, these general policies of the INA would not alone be sufficient to preclude the application of the NLRA to undocumented aliens. It is necessary instead to determine whether the particular provisions of the INA through which Congress has chosen to implement those policies actually conflict with the application of the NLRA in this setting. See, e.g., *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 633-634 (1981); *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 133-134 (1978). They do not, for Congress has chosen not to pursue its immigration policies "at all costs." *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Comm'n*, No. 81-1945 (Apr. 20, 1983), slip op. 29-30. Despite extensive public debate and numerous proposals, Congress thus far has declined to adopt what is widely regarded as the only effective measure to reduce illegal immigration and the competition by illegal entrants for domestic jobs: the imposition of sanctions on an employer who hires un-

documented aliens.²⁷ See, e.g., *United States v. Ortiz*, 422 U.S. 891, 915 (1975) (White, J., concurring in the judgment); *De Canas v. Bica*, *supra*, 424 U.S. at 357; *Plyler v. Doe*, *supra*, 457 U.S. at 218, 228-229; *id.* at 237 (Powell, J., concurring). The Senate has passed such a bill in the current Congress,²⁸ and a similar bill has been reported in the House of Representatives.²⁹ But at least until Congress actually passes such a measure, in view of the express exemption for employment of undocumented aliens in 8 U.S.C. 1324(a), there is no basis for failing to apply the NLRA to such employment.

In any event, enforcement of the NLRA with respect to unfair labor practices committed against undocumented aliens in fact substantially *further*s the policies of INA, including its employment-related provisions. The text of

²⁷ See generally S. Rep. No. 97-485, 97th Cong., 2d Sess. 20-26 (1982). In 1971 and 1972, a subcommittee of the House Judiciary Committee conducted extensive hearings regarding the control of illegal immigration. See *Illegal Aliens, Hearings Before a Subcomm. of the House Comm. on the Judiciary*, 92d Cong., 1st Sess. (1971) (Pts. 1-5). In the 92d and 93d Congresses, the House of Representatives passed bills providing for employer sanctions. H.R. 16188, 92d Cong., 2d Sess. (1972); 118 Cong. Rec. 30186 (1972); H.R. 982, 93d Cong., 1st Sess. (1973); 119 Cong. Rec. 14194-14195, 14208-14209 (1973). No action was taken on these bills in the Senate. In the 94th Congress, the House Judiciary Committee reported a bill containing employer sanctions (H.R. 873, 94th Cong., 1st Sess. (1975); see H.R. Rep. No. 94-506, 94th Cong., 1st Sess. (1975)), but no further action was taken on it. A similar bill was introduced in the next Congress (H.R. 1663, 95th Cong., 1st Sess. (1977)), but it received no further action. After several intervening years of study, the Senate, in the last Congress, passed a bill containing employer sanctions (S. 2222, 97th Cong., 2d Sess. (1982); 128 Cong. Rec. 10618 (daily ed. Aug. 17, 1982)), but the House, after debating a similar bill, failed to act. See H.R. Rep. No. 98-115 (Pt. 1), *supra*, at 31.

²⁸ S. 529, 98th Cong., 1st Sess. § 101 (1981), passed by the Senate on May 18, 1983, 129 Cong. Rec. 6970 (daily ed.); S. Rep. No. 98-62, 98th Cong., 1st Sess. (1983).

²⁹ H.R. 1510, 98th Cong., 1st Sess. § 101 (1983). See H.R. Rep. No. 98-115 (Pt. 1), *supra*, at 2-6.

8 U.S.C. 1182(a) (14) makes clear that its purpose is to preserve jobs for American workers and to admit immigrant aliens only if to do so "will not adversely affect the wages and working conditions of the workers in the United States similarly employed." See also S. Rep. No. 748, 89th Cong., 1st Sess. 15 (1965); *Saxbe v. Bustos*, 419 U.S. 65, 76 & n.29 (1974); *Pesikoff v. Secretary of Labor*, 501 F.2d 757, 761 (D.C. Cir.), cert. denied, 419 U.S. 1038 (1974). Similarly, 8 U.S.C. 1101 (a) (15) (H) (ii) permits the temporary admission of non-immigrant aliens only if unemployed persons capable of performing the work cannot be found in the United States; and Department of Labor regulations implementing this provision require that "to the extent foreign workers are brought in, the working conditions of domestic employees are not to be adversely affected" (*Alfred L. Snapp & Son, Inc. v. Puerto Rico*, No. 80-1305 (July 1, 1982), slip op. 4).

The purpose of 8 U.S.C. 1101(a) (15) (H) (ii) and 1182(a) (14) to protect the wage rates and working conditions of American workers is directly parallel to the purpose of the NLRA to prevent the "depressing [of] wage rates" and to achieve "stabilization of competitive wage rates and working conditions within and between industries" by encouraging collective bargaining and guaranteeing the right of employees to engage in concerted activities. 29 U.S.C. 151. Thus, vigorous enforcement of the NLRA in the context of unfair labor practices committed against undocumented aliens furthers the purpose of 8 U.S.C. 1101(a) (15) (H) (ii) and 1182(a) (14) by affording some assurance that the wages and working conditions of the American workers sought to be protected by those Sections will not be undermined by the employer's offering of substandard wages and working conditions to undocumented aliens. To the extent that the employer realizes no advantage under the NLRA in preferring undocumented aliens to domestic workers, his incentive to hire undocumented aliens is reduced; and the reduction in job opportunities in turn

will diminish the incentive for aliens to enter in violation of the immigration laws. It was therefore consistent with INA for the Board to enforce the NLRA with respect to petitioners' pattern of unfair labor practices committed against undocumented aliens.³⁰

³⁰ The Board's refusal to find an implied exclusion of undocumented aliens from the protections afforded employees under the NLRA is consistent with the treatment of undocumented workers under other protective labor legislation and with the recognition of their right to have their civil injuries—including those deriving from an employment relationship—remedied through the courts. Thus, undocumented aliens have been entitled to recover unpaid minimum wages and overtime pay under the Fair Labor Standards Act (*Brennan v. El San Trading Corp.*, 73 Lab. Cas. (CCH) ¶ 33,032 (1973)); wages due under a labor contract (*Nizamuddowlah v. Bengal Cabaret, Inc.*, 92 Misc. 2d 220, 399 N.Y.S. 2d 854 (Sup. Ct. 1977); *Gates v. River Construction Co.*, 515 P.2d 1020 (Alaska 1973)); worker's compensation (*Commercial Standard Fire & Marine Co. v. Galindo*, 484 S.W.2d 635 (Tex. Civ. App. 1972)); damages for personal injuries sustained during employment (*Hagl v. Jacob Stern & Sons, Inc.*, 396 F. Supp. 779 (E.D. Pa. 1975)); lost wages in a personal injury suit (*Peterson v. Neme*, 222 Va. 477, 281 S.E. 2d 869 (1981); damages for personal injuries in general (*Arteaga v. Litterski*, 83 Wis. 2d 128, 265 N.W. 2d 148 (1978); *Woo Sung Ling v. City of New York*, 276 App. Div. 1026, 95 N.Y.S.2d 908 (Sup. Ct. 1950)); damages for wrongful death (*Torres v. Sierra*, 89 N.M. 441, 553 P.2d 721 (Ct. App. 1976)); *Arteaga v. Allen*, 99 F.2d 509 (5th Cir. 1938)); and damages for breach of a contract of sale (*Moreau v. Oppenheim*, 663 F.2d 1300 (5th Cir. 1981)). Cf. *Hurtado v. United States*, 410 U.S. 578 (1973). Furthermore, undocumented alien workers in this country also are entitled to the constitutional guarantees of due process and equal protection of the laws. *Plyler v. Doe*, *supra*, 457 U.S. at 210; *Mathews v. Diaz*, 426 U.S. 67, 77 (1976); *Wong Wing v. United States*, 163 U.S. 228, 238 (1896).

II. THE BOARD CORRECTLY CONCLUDED THAT PETITIONERS VIOLATED SECTION 8(a)(3) AND (1) OF THE NATIONAL LABOR RELATIONS ACT BY REPORTING THEIR UNDOCUMENTED ALIEN EMPLOYEES TO THE IMMIGRATION AND NATURALIZATION SERVICE IN RETALIATION FOR THEIR UNION ACTIVITIES, THEREBY CONSTRUCTIVELY DISCHARGING THE EMPLOYEES

For the reasons given in Point I, petitioners' pattern of antiunion conduct directed against its undocumented alien employees clearly violated the NLRA. Petitioners contend, however, that the culmination of that course of conduct—their reporting of the employees to the INS because of their Union activities and the employees' resulting loss of their jobs—did not violate the Act. Petitioners of course must concede that Section 8(a)(3) and (1) would have barred them from actually firing the employees for their union activities. But petitioners maintain that they were wholly free to accomplish precisely that result by indirection. They contend that after accepting the labor of these employees knowing of their immigration status, after committing a series of unfair labor practices against them (including threatening to report them to the INS), and after the Regional Director rejected petitioners' objection to the union election that included these employees, they could, with impunity, ~~rid~~ themselves of the employees because of their union activities simply by notifying the INS. We submit that neither the NLRA nor the INA sanctions such flouting by an employer of its obligations under the NLRA.

A. Petitioners' Conduct Constituted A Prohibited Constructive Discharge Of The Employees

Section 8(a)(3) of the NLRA makes it an unfair labor practice for an employer "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." This provision "does not interfere with the normal exercise of the right of the

employer to select its employees or to discharge them"; however, the "employer may not, under cover of that right, intimidate or coerce its employees with respect to their self-organization and representation." *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 45-46 (1937). See also *NLRB v. Transportation Management Corp.*, No. 82-168 (June 15, 1983), slip op. 5-6.

Moreover, "[a]n employer cannot do constructively what the Act prohibits his doing directly." *NLRB v. Holly Bra of California, Inc.*, 405 F.2d 870, 872 (9th Cir. 1969). Accordingly, the Board, with court approval, long has held that a discriminatory discharge may be found not only where an unlawfully motivated employer explicitly dismisses an employee, but also where the employer creates a situation that causes the employee to leave his employment. See, e.g., *NLRB v. Haberman Construction Co.*, 641 F.2d 351, 358 (5th Cir. 1981); *J.P. Stevens & Co. v. NLRB*, 461 F.2d 490, 494 (4th Cir. 1972); *NLRB v. Holly Bra*, *supra*; *NLRB v. Tennessee Packers, Inc.*, 339 F.2d 203, 204-205 (6th Cir. 1964); *Atlas Mills, Inc.*, 3 N.L.R.B. 10, 17 (1937); *Texas Textile Mills*, 58 N.L.R.B. 352, 353-354 (1944).

An employer may be held to have constructively discharged an employee even though the condition that led to the employee's departure was directly caused by a third party. See, e.g., *NLRB v. Newton*, 214 F.2d 472, 475-476 (5th Cir. 1954) (physical ejection from plant of pro-union employees by antiunion employees acquiesced in by employer); *Goodman Lumber Co.*, 166 N.L.R.B. 304, 305 (1967) (employee's father, at behest of employer, created stressful home life by attempting to get employee to revoke union authorization card). Nor is it necessary that the condition that causes the employee to leave his employment occur at the work site or pertain directly to working conditions. Thus in *Goodman Lumber Co.*, *supra*, 166 N.L.R.B. at 305 n.4, the Board explained that, having sought "to utilize the lever of parental control and displeasure to gain its ends [,] [the employer] * * * cannot hide behind the claim that its

unlawful conduct did not cause [the employee] to quit his employment, simply * * * because of an understandable and natural desire to forestall the breakup of his parent's household because of the unnatural strains and pressures exerted on it by [the employer's] conduct." See also *Zenith Optical Co.*, 53 N.L.R.B. 252, 267, 269 (1943) (employee offered choice of resigning or having draft deferment lifted).

Petitioners no longer contest the Board's finding that they had an anti-union motive in creating the circumstances that led to the employees' departure. The element of a direct causal nexus between petitioners' conduct and the employees' loss of their jobs is also clearly present here. INS agent Malin testified at the Board hearing that petitioners' letter was the sole cause of the investigatory visit during which the employees were taken into custody (Pet. App. 12a, 75a), and petitioners knew that the requested INS inquiry would result in the employees' removal from their jobs because they had been aware for some months that the employees did not have proper documentation. See pages 2-4, *supra*.

The court of appeals properly rejected (Pet. App. 12a) petitioners' argument, reasserted here (Br. 13-15), that it was the employees' status as undocumented workers that was the "proximate cause" of the cessation of their employment. The aliens' status under the immigration laws, which petitioners theretofore had ignored, obviously did not in itself "cause" anything—except to the extent it led petitioners to exploit that status in order to avoid their obligations under the NLRA. That the INS might independently have discovered these employees at some time in the future cannot obscure the fact that petitioners engineered their departure when it occurred solely for antiunion reasons.³¹

³¹ Petitioners' reliance (Br. 15) on the fact that the employees were not deported, but instead "voluntarily" left the country, is also misplaced. Upon their apprehension by the INS, the employees were faced with the choice of either remaining in custody to await formal deportation proceedings, or signing INS Form I-274 and

Contrary to petitioners' assertion (Br. 14), it hardly is "fundamentally unfair" to find a violation of the NLRA in these circumstances. That finding is fully consistent with the purpose of the NLRA to prevent discrimination in employment in retaliation for the union activities of employees. Unfairness *would* result, however, if petitioners were free to accomplish that discrimination indirectly, through the INS, free from any consequences under the NLRA.

Petitioners argue (Br. 14) that the INS had a non-discretionary duty to investigate and deport the undocumented alien employees that was not dependent upon petitioners' actions in notifying INS.³² The issue in these unfair labor practice proceedings, however, is the propriety of petitioners' conduct in response to their employees' union activities, not the actions of the INS. Obviously, we do not suggest that the INS acted improperly or that it was obligated to forgo its normal procedures because of petitioners' conduct. But the INS's enforcement of the INA does not cleanse petitioners' discriminatory actions of their illegality under the NLRA.

immediately leaving the country. Both alternatives equally accomplished petitioners' object, which was to terminate the employees' further employment because of their union activities. Petitioners' attempt to rely on the supposed voluntariness of this "Hobson's choice" ignores the very nature of a constructive discharge, whereby an employer creates conditions compelling an abandonment of employment that is "voluntary" in form but not in substance.

³² Petitioners err in suggesting (Br. 14 & nn.4 & 5) that the INS has no discretion in its enforcement of the INA. Under 8 U.S.C. 1357(a), an INS officer is *authorized* to arrest and interrogate aliens, but the allocation of scarce investigative resources or other circumstances may sometimes impose limitations. Moreover, although an immigration judge ordinarily does not have discretion to terminate deportation proceedings pending before him (*Rodriguez-Gonzalez v. INS*, 640 F.2d 1139, 1142 (9th Cir. 1981)); the INS retains some measure of discretion in deciding whether to institute such proceedings. See, e.g., *Pasquini v. Morris*, 700 F.2d 658 (11th Cir. 1983).

B. The Board's Finding Of A Violation Of Section 8(a)(3) And (1) Is Consistent With The Immigration And Nationality Act

The Board's finding of a violation of Section 8(a)(3) and (1) also effects an appropriate accommodation of the policies of the NLRA and the INA in the circumstances of this case. We of course agree with petitioners that in the ordinary situation, an employer or any other person who believes that an alien is present and working in the United States in violation of the immigration laws should notify the INS. In the immigration area, as elsewhere, effective law enforcement often depends upon the conscientious cooperation of members of the public. But petitioners did not report their employees to INS as interested citizens seeking to uphold the law. They did so solely to *evade* their obligations under the law, imposed by the NLRA.

Thus, more is at stake in this case than enforcement of the INA. Petitioners' pattern of conduct in violation of the NLRA and its concededly retaliatory motive in reporting the employees directly implicates the equally strong governmental interest in effective enforcement of the NLRA. As we have explained above (see pages 13-25, *supra*), the policies and provisions of the NLRA and INA are consistent in general and reinforce one another in their particular application to undocumented aliens. Within this framework, a number of factors demonstrate that the Board's finding of a violation of Section 8(a)(3) and (1) properly implements the terms and policies of both Acts in the circumstances of this case.

1. It must be stressed at the outset that we do *not* contend that the NLRA generally bars an employer from notifying the INS if it has reason to believe that an alien is present or working in the United States in violation of the immigration laws. Our submission is limited to the particular situation in which the employer reports an undocumented alien to INS in retaliation for his union activities or other exercise of rights protected by

the NLRA.²³ And even within that category, this case presents aggravated circumstances. Petitioners' retaliatory reporting of the employees to the INS was not an isolated incident. It was the culmination of a series of unfair labor practices committed against the same employees, and it followed by one day the Acting Regional Director's overruling of petitioners' objections to the election based on the aliens' status under the immigration laws, thereby manifesting a disregard for the Board's processes as well. There is no reason to believe that the Board's finding of an unfair labor practice in these circumstances would significantly impede enforcement of the INA by deterring the reporting of violations, because an employer who knowingly employs illegal aliens would not ordinarily report them to the INS and thereby forgo whatever advantage he realized in hiring them. The Board's application of Section 8(a)(3) and (1) in this setting is therefore inherently tailored to circumstances in which there is a substantial likelihood—as well as a specific finding—that the employer made a report to the INS for reasons other than a simple desire to cooperate in the enforcement of the INA.

2. More than simply the practicalities of the situation support this conclusion. The text and legislative history

²³ Petitioners therefore clearly err in contending (Br. 16) that "[t]he court of appeals and the Board have held, in effect, that once illegal alien workers engage in protected union activities, an employer may no longer inquire with the INS, even if it suspects that it might be employing illegal aliens." The Board's holding was based on its finding that the protected union activities actually motivated petitioners' conduct, not simply that the union activities preceded petitioners' letter to INS in time. The Board will not find a violation of the Act where such anti-union animus is not present. For example, in *Bloom/Art Textiles, Inc.*, 225 N.L.R.B. 766, 768-769 (1976), noted by the ALJ here (Pet. App. 75a n.5), the Board held that it was not a violation of Section 8(a)(3) for an employer to discharge an undocumented worker who was a union activist where the evidence showed that the reason for the discharge was not the employee's union activity, but the employer's concern that employment of the undocumented worker was unlawful under California law.

of the INA affirmatively establish that Congress itself attached relatively little importance to relying on employers in the enforcement of the INA. The 1952 Act in which Congress enacted what is now 8 U.S.C. 1324 was entitled an Act "[t]o assist in preventing aliens from entering or remaining in the United States illegally" (66 Stat. 26). Yet Congress explicitly exempted employment from the prohibition in that Act against the harboring of illegal aliens, even though the harboring prohibition was the central feature of Congress' strengthening of previously existing prohibitions designed to prevent illegal immigration. See note 19, *supra*. When Congress enacted this special immunity, it obviously did not anticipate that the employers involved would be disposed to report their alien employees to the INS.

Moreover, when the 1952 legislation was under consideration, the subject of an employer's reporting to the INS was specifically addressed in a manner that strongly supports the Board's decision in this case. As we have explained above (see pages 18-19, *supra*), Senator Douglas proposed an amendment to the bill that would have made it unlawful for an employer knowingly to hire an illegal alien. Significantly, Senator Douglas' amendment also would have required an employer who discovered that one of his employees was an illegal alien to report that information to the INS. 98 Cong. Rec. 798 (1952). Senator Cordon, who supported the proposal to prohibit an employer from hiring illegal aliens, opposed the reporting feature of the amendment and inquired whether Senator Douglas would modify his amendment so as "to relieve the employer of the requirement to become affirmatively a policeman" (*id.* at 800). Senator Douglas agreed to the suggested modification of his amendment (*id.* at 800, 802-803), and thereafter stressed that it would not "require the employer to serve as an enforcement agency" (*id.* at 804). See also *id.* at 805 (remarks of Sen. Cordon) (the deleted language would have "required of every employer that he become an adjunct to the law enforcement service, to the Immigration Service"). The fact that even a sup-

porter of the proposed prohibition against hiring illegal aliens was opposed to requiring employers to report to INS if they discover illegal aliens among their employees strongly indicates that Congress, which rejected the employment prohibition altogether, did not perceive such reporting by employers as essential for effective enforcement of the INA.

This conclusion is further supported by Congress' action with respect to the amendment Senator Douglas offered to the bill enacted in 1951 authorizing an extension of the bracero program. Act of July 12, 1951, ch. 223, 65 Stat. 119-121. The Senate included in its bill a provision that would have imposed criminal sanctions on any employer who hired a Mexican alien knowing or having reason to believe that he was unlawfully present in the United States. That amendment also would have required the employer to report such an alien to the INS. See 97 Cong. Rec. 4952, 4960-4961 (1951). The criminal prohibition was deleted by the Conference Committee, which substituted in its place a non-criminal provision barring an employer who knowingly hired aliens who were present in violation of the immigration laws from obtaining alien workers under the bracero program authorized by the bill. H.R. Conf. Rep. No. 668, 82d Cong., 1st Sess. 3, 7-8 (1951). The bill was enacted in that form. 65 Stat. 120. Significantly, however, the reporting requirement was deleted.³⁴ Thus, the text and legislative history of the 1951 and 1952 Acts reflect a considered congressional judgment not to rely on employers to enforce the immigration laws. This congressional judgment cuts strongly against attaching controlling weight in this case to the governmental interest in encouraging the reporting of violations of the INA.

³⁴ During the debates on the 1952 Act, Senator Cordon argued in favor of the Douglas amendment after it was modified to delete the reporting requirement, noting that he could understand that this requirement in the 1951 bracero bill was "exceedingly objectionable to some" (98 Cong. Rec. 805 (1952)).

3. In contrast, the countervailing statutory policies of the NLRA have particular force in the present setting. We previously have noted, as has this Court,³⁵ that undocumented aliens are especially susceptible to discrimination and exploitation by employers, which in turn adversely affects the job opportunities, wages, and working conditions of citizens and lawfully resident aliens. This vulnerability often stems in part from language and cultural differences or poverty of the alien. But undocumented aliens also "are vulnerable to exploitation because they cannot complain of substandard working conditions without risking deportation." *United States v. Brignoni-Ponce*, *supra*, 422 U.S. at 879. And they are especially vulnerable precisely because of the fear that the employer will report them to the INS because of their activities at the workplace, as petitioner did here. The legislative debates over the years on the undocumented alien problem repeatedly have emphasized this factor (often noting instances in which employers have threatened aliens that they will report them to the INS, as petitioners also did here), and have stressed the importance of eliminating such exploitation.³⁶

Enforcement of the NLRA where the employer reports its alien employees to INS in retaliation for their union activities is directly responsive to these concerns, and thereby furthers the statutory policy of the NLRA of

³⁵ *Plyler v. Doe*, *supra*, 457 U.S. at 219 & n.18; *United States v. Brignoni-Ponce*, *supra*, 422 U.S. at 879.

³⁶ H.R. Rep. No. 92-1366, 92d Cong., 2d Sess. 4 (1972); H.R. Rep. No. 93-108, 93d Cong., 1st Sess. 7-8, 15-16 (1973); H.R. Rep. No. 94-506, 94th Cong., 1st Sess. 6-7, 10 (1975); 98 Cong. Rec. 797 (1952) (remarks of Sen. Douglas); *id.* at 798, 803 (remarks of Sen. Humphrey, referring to "employer blackmail"); *id.* at 804 (remarks of Sen. Lehman); 118 Cong. Rec. 30155 (1972) (remarks of Rep. Rodino); *id.* at 30159 (remarks of Rep. Eilberg); *id.* at 30160 (remarks of Rep. Mayne); *id.* at 30163 (remarks of Rep. Daniels); 119 Cong. Rec. 14181 (1973) (remarks of Rep. Eilberg); *id.* at 14183 (remarks of Rep. Keating); *id.* at 14185 (remarks of Rep. Rodino); *id.* at 14191 (remarks of Rep. Mayne); *id.* at 14192 (remarks of Rep. Bingham).

encouraging collective bargaining and the freedom of employees generally in the exercise of their rights. The status of the individual employees under the INA does not alter this conclusion. The prohibitions and remedies of the NLRA "are designed to aid in achieving the elimination of industrial conflict. They vindicate public, not private, rights." *Virginia Electric & Power Co. v. NLRB*, 319 U.S. 533, 543 (1943). See also *Shepard v. NLRB*, No. 81-1627 (Jan. 18, 1983), slip. op. 7-8.

4. It also is relevant that petitioners themselves facilitated the unlawful presence of the aliens in the United States—the very conduct petitioners reported to the INS—by continuing to employ them. Although Congress enacted an exemption from the criminal prohibitions in 8 U.S.C. 1324(a) for employment of undocumented aliens, this does not serve to divorce petitioners as a factual matter from their complicity in the aliens' presence in violation of the immigration laws. Petitioners therefore do not have a strong equitable claim to avoid the application of the NLRA in these circumstances by relying on the governmental interest in enforcement of the INA. As the court of appeals put it, "an employer has no right to rely on a 'moral obligation' to report illegal aliens (of which he has been previously oblivious) merely to sanctify an otherwise unjustifiable violation of section 8(a)(3)" (Pet. App. 13a).

5. Affirmance of the judgment below would in no way suggest a broad rule under which a person who reports a violation of the law to responsible governmental officials may be subject to liability for that action. This case is narrowly limited to the reporting of undocumented alien employees to the INS by an employer subject to the NLRA in retaliation for conduct of the employees that is protected by the NLRA. The judgment below is supported by the provisions and policies of the NLRA and INA in this area in which the two Acts intersect and in which Congress must be presumed to have intended that they be applied in a harmonious manner. We do not suggest that reports to the INS from other sources—or by employers,

when not in retaliation for union activities—would be unlawful. There likewise is no occasion to consider whether an employer would violate the NLRA by reporting an employee for a violation of a statute other than the INA in retaliation for employee activities that are protected by the NLRA.

Moreover, we do not suggest that an employer could be held liable in a private civil action brought by an undocumented alien to recover damages for injuries allegedly sustained as a result of the employer's reporting them to INS in retaliation for their union activities. Cf. *In re Quarles*, 158 U.S. 532, 536 (1895). Enforcement of the NLRA vindicates public not private rights, on the basis of charges filed by the General Counsel, in much the same manner as a criminal prosecution. Cf. *Butz v. Economou*, 438 U.S. 478, 515 (1978). The fact that an employer may be immune from civil liability for redress of a private wrong does not suggest that he is immune from liability in an action brought by the government to vindicate public rights that are implicated by his conduct. See, e.g., *Briscoe v. Lahue*, No. 81-1404 (Mar. 7, 1983), slip op. 14 n.22, 16 n.26, 20-21 n.32; *Imbler v. Pachtman*, 424 U.S. 409, 429 (1976); *O'Shea v. Littleton*, 414 U.S. 488, 503 (1974). This distinction is significant. Because the General Counsel of the Board has unreviewable discretion to decline to file a complaint (*Vaca v. Sipes*, 386 U.S. 171, 182 (1967); *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 138 (1975)), he can screen cases to ensure that only meritorious complaints are filed and, in this manner, protect against harassment of an employer who reports employees to the INS. Moreover, the Board can tailor its remedy to accommodate the policies of the INA more readily than could a court entertaining a private damage action. See *Shepard v. NLRB*, *supra*, slip op. 7-8; cf. *Southern Steamship Co. v. NLRB*, 316 U.S. 31 (1942).³⁷

³⁷ Petitioners' reliance (Br. 19, 23) on *Southern Steamship* is misplaced. There, the Court held that the Board abused its remedial discretion by ordering the reinstatement with back pay of employees who were fired for engaging in a strike that violated

6. The foregoing discussion also demonstrates that this case is quite different from *Bill Johnson's Restaurant, Inc. v. NLRB*, No. 81-2257 (May 31, 1983), upon which petitioners erroneously rely (Br. 18-19). In *Bill Johnson's*, the Court held that an employer's filing of a suit in state court against its employees seeking damages and injunctive relief for libelous statements and injury to its business is not an enjoined unfair labor practice unless the suit is filed for retaliatory purposes and the suit lacks a reasonable basis. Slip op. 8-11. The Court relied on two factors. First, the Court observed that the right of access to courts for redress of alleged wrongs is an aspect of the First Amendment right to petition the government for redress of grievances, and it concluded that it should be sensitive to First Amendment values in construing the NLRA. Second, the Court noted that in recognition of the compelling interest of the States in maintaining domestic peace, it had construed the NLRA as not preempting the States from providing employers with a civil remedy for tortious conduct during a labor dispute. If the Board were allowed to enjoin a state lawsuit, the Court reasoned, it would follow that the employer would "be totally deprived of a remedy for an actual injury" despite the substantial state interests involved. Slip op. 9-10.

This case is wholly different. The federalism concerns present in *Bill Johnson's* are absent here; this case instead involves the construction of two federal statutes

a criminal statute barring such conduct. Here, in contrast, the provisions of the INA do not directly regulate the employment relationship between an employer and undocumented aliens, much less prohibit the specific conduct—engaging in union activities—that led petitioners to cause the employees' constructive discharge. Cf. *Carpenters Union v. NLRB*, 357 U.S. 93, 111 (1958) (while *Southern Steamship* admonished the Board not to "apply the policies of its statute so single-mindedly as to ignore other equally important congressional objectives," it did not suggest "that the Board should abandon an independent inquiry into the requirements of its own statute and mechanically accept standards elaborated by another agency under a different statute for wholly different purposes").

which, as we have noted, both support the application of the NLRA to unfair labor practices committed against undocumented aliens. In addition, in the particular circumstances of this case, the countervailing interests arising outside the NLRA do not have the same "compelling" force that the Court in *Bill Johnson's* found to support preservation of a remedy in state court. Slip op. 10. Here, the text and legislative history of the INA in fact attach a somewhat diminished importance to the reporting of undocumented aliens by employers who knowingly hire them. This case also differs from *Bill Johnson's* because the Board there sought to enjoin the prosecution of the suit in state court, which would have frustrated the strong state interest in providing a remedy for tortious conduct. Here, the INS was not prevented from enforcing the immigration laws.

This case also does not involve the "right of access to the Courts for 'redress of alleged wrongs,'" as in *Bill Johnson's*. Slip op. 9, quoting *Peddie Buildings*, 203 N.L.R.B. 265, 272 (1973), enforcement denied on other grounds, 498 F.2d 43 (3d Cir. 1974). Petitioners are in the position of informers to a law enforcement agency, not plaintiffs in a lawsuit in court, and they "ha[d] not suffered a legally-protected injury" (*Bill Johnson's*, *supra*, slip op. 12) at the hands of their undocumented alien employees that they sought to have "redressed" by the INS. The "injury" that prompted petitioners to contact the INS was that sustained as a result of the employees' union activities, for which petitioners have no right to obtain redress. Nor did the status of the undocumented alien employees under the INA injure petitioners, because they kept the aliens on the payroll despite that status. Moreover, the provisions of the INA restricting the entry of aliens are intended for the protection of American workers, not their employers, and, in any event, private persons such as petitioners have no legally protected right to procure enforcement of the immigration laws by the INS. *Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973). In these respects as well, petitioners, unlike the employer

who brought the suit in state court in *Bill Johnson's*, were not seeking redress for legal wrongs allegedly committed against them.

Finally, this case differs from *Bill Johnson's* because petitioners themselves tolerated and indeed facilitated the aliens' continued presence in the United States in violation of the immigration laws, about which they now claim an unfettered right to report to the INS. There was no suggestion that the employer in *Bill Johnson's* in any way tolerated or facilitated the employees' conduct for which it sought redress in court. In sum, *Bill Johnson's* does not support petitioners claim of a right to avoid their obligations under the NLRA by reporting their employees to the INS.³⁸

C. Petitioners' Claim That The Decision Below Should Be Reversed Because It Violates Their First Amendment Rights Is Without Merit

Petitioners assert (Br. 16-19) that their letter to the INS was an exercise of their First Amendment right to petition the government for redress of grievances, which they now contend could not be abridged by deeming their action to be unlawful under the NLRA. The short answer to this argument is that it comes too late. Petitioners did not assert before the Board a First Amendment objection to the finding of an unfair labor practice. Section 10(e)

³⁸ This conclusion also is supported by reference to the common law tort of abuse of process, the gist of which is "misusing, or misapplying process justified in itself for an end other than that which it was designed to accomplish"; it applies in cases in which the procedure "has been perverted to accomplish an ulterior purpose for which it was not designed." W. Prosser, *Handbook of the Law of Torts* 856 (4th ed. 1971). See also *Restatement (Second) of Torts* § 682, (1977); *Alexander v. Unification Church*, 634 F.2d 673, 678 (2d Cir. 1980); *Grip-Pak, Inc. v. Illinois Tool Works, Inc.*, 694 F.2d 466, 472 (7th Cir. 1982). Recognition of that tort in other settings strongly reinforces a construction of the NLRA and INA under which the Board may find it to be an unfair labor practice for an employer to misuse the "process" of reporting aliens to the INS for an end other than enforcement of the INA—i.e., in order to evade its responsibilities under another federal statute, the NLRA.

of the Act provides that "[n]o objection that has not been urged before the Board * * * shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." 29 U.S.C. 160(e). Petitioners have pointed to no "extraordinary circumstances" excusing their failure to raise the issue before the Board in this case, and the court of appeals therefore was without jurisdiction to consider the constitutional objection. See, e.g., *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-666 (1982); *Detroit Edison Co. v. NLRB*, 440 U.S. 301, 311 & n.10 (1979); *Bill Johnson's Restaurants, Inc. v. NLRB*, *supra*, slip op. 18 n.15. Moreover, petitioners did not raise their First Amendment argument before the court of appeals or in their petition for a writ of certiorari. For these additional reasons, the issue is not properly raised here. Sup. Ct. R. 21.1(a).

In any event, petitioner's contention that the Board's finding of an unfair labor practice in this case violated their First Amendment rights is without merit. The First Amendment protects the "right of the people peaceably to assemble, and to petition the Government for a redress of grievances." As is suggested by its terms, this guarantee was understood at the time it was adopted principally as protecting political activity to influence the legislature.⁹⁹ The Court subsequently has concluded that

⁹⁹ See 1 B. Schwartz, *The Bill of Rights: A Documentary* 198 (1971) (Declaration of Rights and Grievances of the Congress, 1765, art. XIII); *id.* at 217 (Declaration and Resolves of the First Continental Congress, 1774, Resolve 8); *id.* at 266 (Pennsylvania Declaration of Rights, 1776, art. XVI); *id.* at 277 (Delaware Declaration of Rights, 1776, art. 8); *id.* at 287 (North Carolina Declaration of Rights, 1776, art. XVIII); *id.* at 324 (Vermont Declaration of Rights, 1777, art. XVIII); *id.* at 372-373 (Massachusetts Declarations of Rights, 1780, art. XX); *id.* at 379 (New Hampshire Bill of Rights, 1783, art. XXXII); *id.* (Vol. 2) at 681 (proposed amendment in Massachusetts ratifying convention); *id.* at 735 (proposed amendment 14 in Maryland ratifying convention); *id.* at 842 (proposed amendment 15 in Virginia ratifying convention);

access to courts is an aspect of the right of petition as well. See, e.g., *Bill Johnson's Restaurants, Inc. v. NLRB*, *supra*, slip op. 9. This extension of the right finds some support in the text of the Amendment, because a person seeking damages or an injunction in court may be said to be seeking "redress" for a "grievance" or wrong done to him. See also note 39, *supra*. The same is true where a party invokes the quasi-judicial process of an administrative agency. See, e.g., *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972). But as we have explained above (see pages 38-39, *supra*), petitioners in this case did not invoke an administrative process for redress of any wrongs committed against them. It would be a considerable extension of the right of petition to include within its sweep the absolute immunity petitioners seek for informing a law enforcement agency of a violation of the law, even when done solely for a retaliatory or invidious purpose.⁴⁰ In fact, this Court has not treated the reporting of violations to a law enforcement agency

id. at 913 (proposed amendment in New York ratifying convention); *id.* at 968 (proposed amendment 15 in North Carolina convention); *id.* at 1026, 1089-1095, 1103 (debates in House of Representatives). But see *id.* (Vol. 1) at 73 (Massachusetts Body of Liberties, 1641, art. 12) ("liberties to come to any publique Court, Council, or Towne meeting, and either by speech or writinge to move any lawfull, seasonable, and materiall question, or to present any necessary motion, complaint, petition, Bill or information"); *id.* at 377 (New Hampshire Bill of Rights, 1783, art. XIV) (every subject entitled to a certain remedy, by recourse to the laws).

⁴⁰ Petitioners rely (Br. 17) on a passage in *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 139 (1961), in which the Court stated that the right of the people to inform their representatives in government of their desires with respect to the passage "or enforcement of [the] laws" cannot be made to depend on their intent in doing so. *Noerr*, however, involved political activity that was directly related to the purposes of the First Amendment right to petition. See page 40 and note 39, *supra*. Petitioners' retaliatory reporting of information to the INS was of a quite different nature.

as an aspect of the right of petition. See *In re Quarles*, 158 U.S. 532, 535-536 (1895).⁴¹

Contrary to petitioners' suggestion (Br. 20), the Court in *Bill Johnson's* did not hold that the First Amendment would preclude the finding of an unfair labor practice based on a retaliatory motive even where access to the courts is involved. The Court simply stated that it should be "sensitive to First Amendment values" in construing the NLRA. Slip op. 9. See also slip op. 3 (Brennan, J., concurring) ("I do not suggest that a constitutional issue surfaces directly in this case"). In our view, the Constitution does *not* bar Congress from attaching adverse consequences to the institution of judicial proceedings when "deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification" (*Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978), quoting *Oyler v. Boles*, 368 U.S. 448, 456 (1962)), even if the proceedings themselves are meritorious. See also *O'Shea v. Littleton*, 414 U.S. 488, 503 (1974). One such "arbitrary classification" Congress constitutionally

⁴¹ In *Quarles*, the Court held that violence committed against a person who informed a federal agency of a violation of the law could be punished by federal law (Rev. Stat. 5508 (1878 ed.), now 18 U.S.C. 242), rather than state law, because that right is secured by the Constitution of the United States. 158 U.S. at 537. The Court did not hold, however, that the right is absolute and that no consequences could be attached to retaliatory or invidious motivation in doing so. To the contrary, the Court indicated that protection of the citizen's ability to inform law enforcement agencies principally serves the "necessity of the government," not solely the interest of the person reporting. 158 U.S. at 536, quoting *Ex parte Yarbrough*, 110 U.S. 651, 662 (1884). This is consistent with the Court's treatment of the evidentiary privilege for communications by an informer. As the Court stated in *In re Quarles*, that privilege belongs to the government, not the informer personally. 158 U.S. at 536. See also *Roviaro v. United States*, 353 U.S. 53, 59 (1957). Accordingly, the Constitution does not require that the individual's interest in reporting a violation of the law be granted an absolute immunity, even where information is reported for a retaliatory purpose in violation of another compelling "necessity of the government," as reflected in the NLRA.

may identify is one based upon the exercise by employees of rights protected by the NLRA, especially since the employees' rights themselves implicate the First Amendment. See, e.g., *Babbitt v. United Farm Workers National Union*, 442 U.S. 289, 313 (1979). A fortiori, it does not violate the First Amendment to find an unfair labor practice in the retaliatory reporting of violations to the INS, which does not directly implicate the right of petition.

III. THE BACKPAY AWARD ENTERED IN THIS CASE EFFECTUATES THE POLICIES OF THE NATIONAL LABOR RELATIONS ACT AND DOES NOT CONFLICT WITH THE IMMIGRATION LAWS

Petitioners do not appear to challenge those portions of the Board's remedial order, as modified by the court of appeals, that condition reinstatement of the discriminatees upon their being legally present and permitted by law to be employed in the United States and that, except as discussed hereafter, toll the accrual of backpay for periods during which the discriminatees are unable to satisfy these conditions (Pet. App. 23a, 31a-32a). Their basic challenge is to that portion of the order which provides for a minimum of six months' backpay irrespective of whether the discriminatees actually were absent from the country and unavailable for employment during that period. Contrary to petitioners' contention, this provision effectuates the policies of the NLRA and does not conflict with the immigration laws.

1. Section 10(c) of the NLRA empowers the Board, when it finds that a person has committed an unfair labor practice, to issue an order requiring that person to "cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of [the] Act" (29 U.S.C. 160(c)). In the case of discriminatory discharges, this Court has recognized that reinstatement and backpay are the only effective means of restoring the situation, "as nearly as possible, to that

which would have obtained but for the illegal discrimination." *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941). Restoration of the status quo ante reassures the discriminatees and their fellow employees alike that their employer may not violate the Act with impunity and that they will be made whole for economic injuries suffered for exercising rights under the Act; through such reassurance, "they may be more confident in the exercise of their statutory rights" (*Virginia Electric & Power Co. v. NLRB*, 319 U.S. 533, 541 (1943)). The backpay order in this case is consistent with these principles.

It is plain beyond serious dispute that each of the five aliens would have continued to work for some period beyond February 18, 1977 but for petitioners' unlawfully motivated report to INS. It is equally plain, therefore, that each of the aliens suffered some loss of earnings as a result of petitioners' unfair labor practices. The six-month minimum backpay award rests on the court of appeals' estimate of the period that the discriminatees would have continued in petitioners' employ if petitioners had not reported them to the INS (Pet. App. 23a, 28a). Petitioners have not shown that this estimate is unreasonable.⁴²

Petitioners contend (Br. 27) that the six-month figure is purely speculative and thus results in a windfall to the undocumented aliens. However, the Board, upheld by the courts, consistently has approximated the status quo ante in situations where, because of the unfair labor practice, it is impossible to ascertain it with certainty.⁴³

⁴² In 1977, when petitioners' conduct occurred, it was estimated that only one in three undocumented aliens was ever apprehended. See President's Message to Congress Regarding Undocumented Aliens, 13 Pub. Papers 1169 (Aug. 4, 1977). One study showed that for those apprehended, the average pre-arrest length of residence in this country was 2.5 years, that over 36 percent of apprehended aliens had been here for more than three years, and that ten percent had stayed more than six years. *Exploratory Study*, *supra* note 13, at 81.

⁴³ See, e.g., *Phelps Dodge Corp. v. NLRB*, 405 F.2d 787, 789-790 (3d Cir. 1968), cert. *denied*, 396 U.S. 828 (1969); *NLRB v. Superior Roofing*

For, as this Court has stated, "[t]he most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of uncertainty which his own wrong has created." *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 265 (1946). See also *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 566-567 (1981) ("it does not 'come with very good grace' for the wrongdoer to insist upon specific and certain proof of the injury * * * it has itself inflicted"); *NLRB v. Remington Rand, Inc.*, 94 F.2d 862, 872 (2d Cir.), cert. denied, 304 U.S. 576 (1938).⁴⁴

2. Petitioners' contention (Br. 19-21) that the backpay award is inconsistent with the INA and that the five alien employees were "not entitled to backpay" (*id.* at 26) because of their status under the immigration laws misconceives the nature and purpose of a backpay remedy. The power to order affirmative relief under the NLRA is incidental to the primary purpose of Congress to stop and prevent unfair labor practices. Thus, a reimbursement order issued by the Board "is not a redress for a private wrong." *Virginia Electric & Power Co. v.*

Co., 460 F.2d 1240, 1241 (9th Cir. 1972); *NLRB v. Miami Coca-Cola Bottling Co.*, 360 F.2d 569, 572 (5th Cir. 1966); *Leeds & Northrup Co. v. NLRB*, 391 F.2d 874, 880 (3d Cir. 1968). Cf. *Fibre-board Paper Products Corp. v. NLRB*, 379 U.S. 203, 215-217 (1964).

⁴⁴ Contrary to petitioners' contention (Br. 26), the six-month minimum backpay award is not inconsistent with the Board's policy of tolling backpay for periods when discriminatees are unavailable for work. Where an employee voluntarily absents himself from the job market by, for example, taking a vacation or refusing to seek employment, the Board will toll backpay liability for that period. See, e.g., *Gary Aircraft Corp.*, 210 N.L.R.B. 555, 557 (1974); *Garrard Convalescent Home, Inc.*, 220 N.L.R.B. 450, 452 (1975). However, where unavailability is due to an illness, injury, or other event that would not have occurred but for the unlawful discharge, backpay liability will not be tolled for that period. *American Mfg. Co. of Texas*, 167 N.L.R.B. 520, 522-523 (1967); *Fabric Mart Draperies*, 182 N.L.R.B. 390 (1970); *Graves Trucking Inc.*, 246 N.L.R.B. 344, 345 (1979), enforced as modified, 692 F.2d 470, 474-477 (7th Cir. 1982); *Moss Planing Mill Co.*, 103 N.L.R.B. 414, enforced, 206 F.2d 557 (4th Cir. 1953).

NLRB, *supra*, 319 U.S. at 543. Such orders "somewhat resemble compensation for private injury, but it must be constantly remembered that [they] are remedies created by statute * * * which are designed to aid in achieving the elimination of industrial conflict. They vindicate public, not private, rights." *Ibid*. See also *Shepard v. NLRB*, No. 81-1627 (Jan. 18, 1983), slip op. 7-8; *Automobile Workers v. Russell*, 356 U.S. 634, 642-643 (1958).

Consistent with these principles and the provisions of the INA, we may assume that the aliens themselves could not maintain a private breach-of-contract suit for wages they lost following their return to Mexico. See page 36, *supra*. But it does not follow that the INA bars the Board from awarding backpay to vindicate the *public* rights involved. It was not unlawful under the INA for petitioners to hire the undocumented aliens. Since petitioners took advantage of the immunity granted them by 8 U.S.C. 1324(a) to do so, petitioners cannot be heard to argue that their employment of the aliens was so contrary to public policy that they may not be held liable in any respect for the unlawful constructive discharge of the employees. Indeed, in the circumstances of this case, inability of the Board to provide an effective remedy for petitioners' discrimination against their undocumented alien employees not only would encourage the repetition of similar acts of discrimination in the future; it also would undermine the rights of petitioners' non-alien employees.⁴⁵

⁴⁵ There is no merit to petitioners' contention (Br. 22-23) that the backpay award encourages illegal immigration. Insofar as the six-month minimum backpay award is concerned, the discriminatees are entitled to it irrespective of their presence in the country. Their entitlement to any backpay in addition to that amount is conditioned upon their being lawfully entitled to be present and employed in the United States.

Insofar as petitioners argue more generally that affording undocumented aliens a remedy for wrongs done them while working in this country provides an inducement to unlawful immigration, the argument is untenable. "It cannot be seriously argued that people enter this country illegally so they can recover for an injury

IV. THE COURT OF APPEALS' DECISION REGARDING THE OFFERS OF REINSTATEMENT IS REASONABLE IN THE CIRCUMSTANCES OF THIS CASE

The court of appeals rejected the Board's conclusion that the reinstatement offers petitioners mailed to the discriminatees on March 29, 1977 were deficient because they were not unconditional (Pet. App. 21a-22a). However, the court found the offers deficient on other grounds not reached by the Board, and it modified the Board's order accordingly. The court found the offers inadequate because the 30-day period for acceptance "did not give the discriminatees a reasonable time to consider the offer and make arrangements for legally entering the United States," and held that the offers instead should be kept open for four years (*id.* at 22a). The court further held that the offers were ineffective "because they were not delivered * * * in a manner allowing verification of receipt and they were not written in the discriminatees' native language (Spanish)" (*ibid.*).

Rather than disposing of these issues and enlarging the Board's remedial order in this fashion, the court of appeals should have remanded for the Board to consider the alternative grounds on which the court believed the offers may have been deficient and the form any new offers of reinstatement should take. *NLRB v. Food Store Employees*, 417 U.S. 1, 8-9 (1974). Nevertheless, we believe that the court of appeals' decision reasonably effectuates the purposes of the Act in the circumstances of this case. Should the Court disagree, we respectfully submit that the appropriate course would be for the Court to va-

that will be inflicted upon them later." *Arteaga v. Literski*, 83 Wis. 2d 128, 132, 265 N.W. 2d 148, 150 (1978). See also *Peterson v. Neme*, 222 Va. 477, 482, 281 S.E. 2d 869, 872 (1981) ("Ordinarily, a person seeks a job because he needs to earn a living, not because he wants to become legally eligible to recover wage losses occasioned by tortious injury. We fail to see how allowing Neme's claim for wages lost on account of Peterson's tort would encourage other illegal aliens to seek employment in this country.").

cate the judgment below in this regard and remand to the Board for consideration of these issues in the first instance.

1. Petitioners' objection (Br. 32-33) to the court of appeals' holding that their reinstatement offers be made in Spanish and in a manner allowing verification of receipt is without merit in this case. The "employer's offer of reinstatement must be reasonably calculated to communicate the offer." *Carruthers Ready Mix, Inc.*, 262 N.L.R.B. No. 90 (July 9, 1982), slip op. 7. See also *Monroe Feed Store*, 122 N.L.R.B. 1479, 1480-1481 (1959); *Rutter-Rex Mfg. Co.*, 158 N.L.R.B. 1414, 1424 (1966). Cf. Foreign Sovereign Immunities Act, 28 U.S.C. 1608 (service on a foreign state or its political subdivision, agency or instrumentality shall be made in the official language of the foreign state and "by any form of mail requiring a signed receipt").⁴⁶

2. The court of appeals' requirement that the offers of reinstatement be kept open for four years also is reasonable in the circumstances of this case. The Board has never adopted a fixed rule for determining the appropriate length of time that a reinstatement offer must remain open; instead, it is the Board's policy that "the 'reasonable time' will depend essentially on the situation

⁴⁶ *General Iron Corp.*, 218 N.L.R.B. 770 (1975), aff'd, 93 L.R.R.M. 2336 (2d Cir. 1976) (table), relied on by petitioners (Br. 31), is not to the contrary. There the Board explained (218 N.L.R.B. at 771) that the Spanish speaking employees could reasonably be expected to have a neighbor or family member who could speak English. The Board also noted that its rules did not require service by registered mail, but added that if the employer uses ordinary mail, it "runs the risk" of not being able to prove service should there be any question as to whether the notices were in fact received.

Here, it is not reasonable to assume that the discriminatees, having returned to Mexico, will have such ready access to English-speaking relatives or acquaintances. Moreover, in *General Iron*, as in the normal case, the notices were mailed to the address where the employees could be presumed still to be residing. Here, by contrast, the addresses in Mexico to which the reinstatement letters were sent were not the employees' last known addresses, but addresses at which the employees had lived at some time before coming to Chicago to work for petitioners.

in which an employee finds himself as a result of the discrimination against him." *Fredeman's Calcasieu Locks Shipyard, Inc.*, 208 N.L.R.B. 839 (1974). Accord: *NLRB v. Murray Products, Inc.*, 584 F.2d 934, 940 (9th Cir. 1978). And see *Southern Household Products Co.*, 203 N.L.R.B. 881, 882 (1974) (reinstatement offers must allow discriminatees "a reasonable time to consider whether to return to [the employer's] employ, how they were to get there, and what they were likely to face upon arriving there"). In light of the substantial delays that applicants from Mexico encounter in obtaining immigrant visas,⁴⁷ it is plain that the 30-day period for which the offers were held open by petitioners would not provide a realistic opportunity for the aliens to return for reinstatement. The four-year period ordered by the court of appeals is reasonable in light of these backlogs.⁴⁸

⁴⁷ We have been informed by the INS that as of September 1983, the backlogs for Mexican nationals to obtain immigrant visas in the six preference categories (8 U.S.C. 1153(a)(1)-(6)) were as follows: First (unmarried children of U.S. citizens), current; Second (spouses and unmarried children of permanent resident aliens), 11 years; Third (professionals and persons of exceptional ability in the sciences or arts), current; Fourth (married children of U.S. citizens), 6½ years; Fifth (siblings of U.S. citizens over age 21), 15 years; Sixth (aliens seeking to enter to perform labor for which there is a shortage of persons in the United States), 2½ years. No visas are available for any nonpreference aliens.

⁴⁸ Petitioners argue (Br. 30) that the reinstatement order places an inordinate hardship on their current employees who may be displaced if the discriminatees return to their jobs. It is, however, well settled that an employer whose unfair labor practice causes its employees to leave their jobs must reinstate those employees even if they have been replaced, despite the necessity of dismissing their replacements. See *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 278 (1956); *M.H. Ritzwoller Co.*, 15 N.L.R.B. 15, 29 (1939), enforced in relevant part, 114 F.2d 432, 437 (7th Cir. 1940); *NLRB v. Kohler Co.*, 351 F.2d 798, 804-805 (D.C. Cir. 1965); *NLRB v. Giannasca*, 119 F.2d 756, 758 (2d Cir. 1941). See also *NLRB v. Remington Rand, Inc.*, 94 F.2d 862, 871 (2d Cir.), cert. denied, 304 U.S. 576 (1938).

Petitioners also contend that the four-year period ordered by the court will create undue uncertainty as to whether the discriminatees will return to accept reinstatement. However, we do

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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not believe that the judgment of the court of appeals would prevent petitioners from including in their offers of reinstatement a condition that the discriminatees respond to the letter within a reasonable period of time to indicate their interest in the offer, even though they must be permitted four years within which to be admitted. When petitioners receive those responses, if any, they then can notify their present employees of the situation in order to prevent any unfair surprise. Cf. *Belknap v. Hale*, No. 81-1966 (June 30, 1983).

Insofar as petitioners suggest (Br. 30) that such a result would be inequitable here because "illegal aliens" would displace "American workers," they ignore that the discriminatees will be accorded reinstatement only if they obtain proper documentation—a condition that will render them as entitled to employment as any worker currently on petitioners' payroll. Furthermore, the record does not reflect the citizenship or immigration status of petitioners' current workforce.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

SURE-TAN, INC. and SURAK LEATHER COMPANY,
Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

REPLY BRIEF OF PETITIONERS

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ARGUMENT

- I. THE BOARD INCORRECTLY CONCLUDED THAT PETITIONERS VIOLATED SECTION 8(a)(3) AND (1) OF THE NATIONAL LABOR RELATIONS ACT BY REQUESTING THAT THE IMMIGRATION AND NATURALIZATION SERVICE INVESTIGATE THE IMMIGRATION STATUS OF ITS EMPLOYEES.

Respondent recognizes that an employer has a right to report a violation of the immigration laws to the INS, but contends that this right is conditioned upon the employer's motive for reporting the violation. (R. Br. 30).^{1/} Respondent argues that Sure-Tan must, in effect, pay damages for the admittedly lawful actions of the INS because it reported a suspected violation of the immigration laws to the INS with an improper motive. (R. Br. 28). Neither the NLRA nor the INA condition the right to

^{1/} References herein to the Brief For The National Labor Relations Board will be denoted with the designation "R. Br." References to Brief of Petitioners will be denoted with the designation "P. Br."

report a violation of the law upon the informant's motive; nor does the Constitution permit such abridgment of the right to report a violation of the law.

A. Petitioners' Conduct Did Not
 Constitute An Unlawful Constructive
 Discharge.

Relying upon NLRB v. Newton, 214 F.2d 472, 475-476 (5th Cir. 1954) and Goodman Lumber Co., 166 N.L.R.B. 304, 305 (1967), Respondent argues that Petitioners constructively discharged the illegal aliens by creating an intolerable condition that led to their deportation. (R. Br. 27). The cases that Respondent relies on are readily distinguishable from the present case. In Newton, the employer condoned an assault upon an employee by her fellow employees. Following the assault, while the employee was suffering from severe injuries and in need of medical attention, the employer ordered her to either work or get out of

the plant. In Goodman, the employer pressured an employee to convince his son, who was also an employee of the company, to abandon his support for the union. As a result of the father's pressure, the son resigned from the company.

The present case, in contrast, does not involve an employee's decision to terminate his employment induced by violent or coercive conduct illegally taken at the behest of an employer. Rather, it involves employees being removed from the job by actions properly taken by law enforcement officials to enforce federal immigration laws. The abusive conduct of private third parties in Newton and Goodman is not even remotely similar to the law enforcement activities of the INS in the present case. The condition which mandated the deportation of the illegal aliens in this case was their own illegal status, not the action of Sure-Tan.

Respondent argues that there was a "direct causal nexus" between Petitioners' inquiry to the INS and the deportation of the illegal aliens, because Petitioners "knew that the requested INS inquiry would result in the employees' removal from their jobs. . . ." (R. Br. 28). Later, Respondent contradicts this assertion, arguing that: "The INS retains some measure of discretion in deciding whether to institute [deportation] proceedings." (R. Br. 29 n. 32). If, as Respondent suggests, the INS retains discretion in deciding whether to deport an illegal alien, Petitioners could not have been the direct cause of the illegal aliens' deportation; that action, according to Respondent, was discretionary with the INS.

B. Petitioners' Right To Report A Violation Of The Immigration Laws Is Not Conditioned Upon Petitioners' Motive For Reporting the Violation.

Respondent recognizes that effective

law enforcement depends upon the conscientious cooperation of the public with law enforcement agencies. (R. Br. 30). Respondent further recognizes that, as a general principle, a person who reports a violation of the law to responsible government officials should not be subject to liability for that action. (R. Br. 35). Respondent argues, however, that liability for reporting a suspected violation of the immigration law should be imposed where the action is taken "for reasons other than a simple desire to cooperate in the enforcement of the INA." (R. Br. 31). Respondent would thus condition a person's right to report a violation of the law upon the Board's conclusions as to the person's motive for reporting the violation.

Contrary to Respondent's argument, this Court recognized in In Re Quarles, 158 U.S. 532, 535 (1895), that:

It is the duty and the right, not only of every peace officer in

the United States, but of every citizen, to assist in the prosecuting, and in securing the punishment of, any breach of the peace of the United States. . . . It is likewise his right and his duty to communicate to the executive officers any information which he has of the commission of an offence of those laws. . . .

Mindful of the paramount importance of citizen cooperation with law enforcement agencies, this Court observed that: "[I]t is the duty of [the] government to see that [a citizen] may exercise this right freely, and to protect him from violence while so doing or on account of so doing." Id. at 536. Nowhere in Quarles did this Court condition the right to report a violation of the law on the informant's motive for reporting the violation.

Similarly, in Bill Johnson's Restaurants, Inc. v. NLRB, ___ U.S. ___, 103 S.Ct. 2161, 2170 (1983), this Court held that where a compelling public interest in the maintenance of domestic peace is involved, the NLRA is not to be enforced

in derogation of that public interest against those who seek to enforce other legal rights, regardless of the person's motive for seeking enforcement of those rights.^{2/}

Respondent argues that, although Petitioners may be immune from civil liability for their actions, that immunity does not apply to an action brought against Petitioners by the government. (R. Br. 36). In support of this argument, Respondent cites Briscoe v. Lahue, ___ U.S. ___ ; 103 S.Ct. 1108, 1118 n. 22, 1118-1119 n. 26, 1121-22 n. 32 (1983), wherein this Court observed that witnesses enjoy no common law immunity from criminal

^{2/} Accord, Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc. 365 U.S. 127, 139 (1961), rehearing denied, 365 U.S. 875 (1961) (Right of railroad companies to encourage rigid law enforcement action against competing trucking companies was protected, even though the action was motivated by anticompetitive intent and would have otherwise been unlawful under the antitrust laws); See P. Br. 17.

prosecution for perjury. Briscoe is wholly inapposite because Petitioners, unlike the witnesses in Briscoe, were not accused of providing the government with false information. To the contrary, the illegal aliens in this case admitted their illegal presence in the United States and voluntarily returned to Mexico.^{3/}

The same policies mandating immunity from civil liability for a person who reports a violation of the law also mandate immunity from government prosecution. The prospect of liability in a government initiated action for providing law enforcement agencies with information concerning

^{3/} Likewise, Imbler v. Pachtman, 424 U.S. 409, 429 (1976), and O'Shea v. Littleton, 414 U.S. 488, 503 (1974), cited by Respondent (R. Br. 36.), do not support Respondent's contention that an employer who is immune from civil liability for redress of a private wrong is not immune from liability in an action brought by the government. This Court observed in those cases that, although prosecutors and judges are immune from liability in suits under

(footnote continued)

violations of the law would be just as likely to deter citizens from providing that information as the prospect of civil liability for such action.

Respondent suggests that employers can take solace in, and be protected by, the fact that the Board's General Counsel has unreviewable discretion in deciding whether to file a complaint, and thus can screen cases to ensure that only meritorious complaints are filed. (R. Br. 36). As Judge Wood observed, however, the Board is inclined to "use only its private knothole to view these issues and sees nothing except its

Footnote 3/ continued

42 U.S.C. § 1983, they can be punished criminally for willful deprivations of constitutional rights under 18 U.S.C. § 242, the criminal analog of § 1983. The reporting of a violation of the law by a private citizen which properly results in the arrest and prosecution of the wrongdoer, and which does not involve a deprivation of a Constitutional right, is clearly distinct from a willful deprivation of a Constitutional right by a public official.

own labor goals." (J. Wood, Dissent to Order Denying Sure-Tan's Request for Rehearing; 38a). The unreviewable discretion of the General Counsel in deciding whether to issue a complaint is further reason to safeguard employers from the prospect of liability under the NLRA for providing information to law enforcement authorities.

Respondent tries to avoid the impact of Bill Johnson's, supra, by arguing that it applies only to plaintiffs in a civil lawsuit, not to informers to a law enforcement agency. Respondent's restrictive misreading of Bill Johnson's ignores the compelling public interest in the maintenance of domestic peace recognized by this Court in that case. Citizen cooperation with law enforcement agencies is just as important to the maintenance of public peace as the redress of private wrongs in civil lawsuits. For the same reasons that citizens must enjoy an unfettered right to enforce legal

rights through well-founded civil lawsuits, they must enjoy an unfettered right to seek enforcement of the law by reporting violations of the law to law enforcement agencies.

Respondent contends that the INS was not prevented from enforcing the immigration law as a result of holding Sure-Tan liable for reporting the illegal aliens. (R. Br. 38). This argument ignores the fact, noted earlier in Respondent's Brief, that INS Agent Malin testified at the Board hearing that Petitioners' letter was the sole cause of the INS investigation. (R. Br. 28). Malin's testimony illustrates that the free flow of information from citizens to law enforcement agencies is essential to effective law enforcement. This critical source of information would be seriously jeopardized if citizens could be held liable by one government agency for providing information concerning violations of the law to another government agency.

Respondent also asserts that this case differs from Bill Johnson's because Sure-Tan condoned the illegal aliens' presence in the United States by employing them while they resided in this country. As Respondent properly points out, however, the INA does not prohibit employers from employing illegal aliens, nor does it require employers to report them to the INS. (R. Br. 18-23). Sure-Tan certainly did not forfeit its right to report a violation of the law by not promptly reporting the illegal aliens to the INS, particularly when it was not legally obligated to report them in the first place. There is no suggestion in Bill Johnson's that the compelling public interest in protecting the public peace is conditioned on or limited by when a law enforcement action is taken, or by the motives for taking the action. To the contrary, this Court held in Bill Johnson's that the right to seek enforcement of the

law is protected from the Board's attack,
regardless of the employer's motive. 103
S.Ct. at 2170.^{4/}

C. Petitioners Have A Constitutional
Right To Report A Violation Of The
Immigration Laws and Are Not Barred
From Asserting That Right Before
This Court.

1. Petitioners Have Not Waived
Their Constitutional Right To
Petition The Government.

Respondent attempts to sidestep Petitioners' Constitutional right to petition the government by asserting that Petitioners are barred from asserting this right under Section 10(e) of the Act because they did not raise this defense before the Board. 29 U.S.C. ¶ 160(e). Respondent further

^{4/} Respondent maintains that the imposition of liability on Sure-Tan for reporting illegal aliens to the INS is supported by reference to the common law tort of abuse of process. (R. Br. 39 n. 38). Respondent fails to point out that "there is no liability [for abuse of process] where the defendant has done nothing more than carry out the process to its authorized conclusion,

(footnote continued)

contends that Petitioners are barred from raising the First Amendment defense by Supreme Court Rule 21.1(a) because they did not raise this argument before the court of appeals or in their petition for a writ of certiorari.

Footnote 4/ continued

even though with bad intentions." W. Prosser, Handbook of The Law of Torts, 857 4th Ed. (1971). See also Restatement Second of Torts § 682, Comment (B) (1982) ("[T]here is no action for abuse of process when the process is used for the purpose for which it is intended, but there is an incidental motive of spite or an ulterior purpose of benefit to the defendant. Thus the entirely justified prosecution of another on a criminal charge does not become abuse of process merely because the instigator dislikes the accused and enjoys doing him harm; nor does the instigation of justified bankruptcy proceedings become abuse of process merely because the instigator hopes to derive benefit from the closing down of the business of a competitor.") Sure-Tan reported the illegal aliens to the INS for the purpose of having the INS enforce the immigration laws, which is precisely what happened. The fact that Petitioners may have had an ulterior purpose does not make the action an abuse of process. If anything, Respondent's abuse of process analogy supports Petitioners' argument that Sure-Tan's reporting of the illegal aliens to the INS was not illegal, regardless of Petitioners' motives.

Respondent overlooks the fact that Bill Johnson's was decided six months after Petitioners filed their petition for a writ of certiorari. Prior to this Court's decision in Bill Johnson's, the Board had held that a retaliatory motive was the only essential element of a violation of the Act in a situation where an employer sues to enjoin employees from engaging in protected conduct. Id. at 103 S. Ct. 2168. This Court's holding in Bill Johnson's, requiring an inquiry as to the merits of the employer's case as well as the employer's motive, represents a substantial departure from established Board precedent. Such a reversal of Board precedent is precisely the "extraordinary circumstance" contemplated in Section 10(e) of the Act which would justify Petitioners' not having raised this issue before the Board. NLRB v. Lundy Manufacturing Corp., 286 F.2d 424, 426 (2d Cir. 1960).

Likewise, the general principle embodied in Supreme Court Rule 21.1(a) against considering issues not raised in the petition or in courts below is not absolute. This Court has frequently allowed parties to raise issues for the first time before this Court where there has been a significant change in the law since trial. In Curtis Publishing Co. v. Butts, 388 U.S. 130, 144-145 (1967), for instance, this Court held that the failure of Curtis Publishing Company to raise a First Amendment defense at trial did not constitute a waiver of the defense. In Curtis, an intervening decision of this Court substantially changed the governing law. This Court observed that it was not unreasonable for counsel for the plaintiff to rely at trial on defenses provided by current law, and further noted that: "Where the ultimate effect of sustaining a claim of waiver might be an imposition on that

valued freedom [viz., the First Amendment freedom of speech], we are unwilling to find waiver in circumstances which fall short of being clear and compelling." Id at 145.^{5/}

Likewise, in the present case, given the state of the law prior to this Court's decision in Bill Johnson's, it was not unreasonable for counsel for Petitioners to rely upon the defenses provided by established Board law. Further, as in Curtis, the effect of sustaining a claim of waiver would be an imposition on a fundamental right -- the right of a citizen to report a violation of the law to a law enforcement

^{5/} Accord, Uebersee Finanz-Korporation, A. G. v. McGrath, 343 U.S. 205 (1952) (In view of the holding in the intervening case of Kaufman v. Societe Internationale, 343 U.S. 156 (1952), District Court ordered to reopen a case to permit the plaintiff to assert a new defense first enunciated in Kaufman); Rosenblatt v. Baer, 383 U.S. 75 (1966) (Libel case that was tried before this Court decided New York Times Company v. Sullivan, 376 U.S. 254 (1964) was

(footnote continued)

agency -- which lies at the heart of a republican form of government. In Re Quarles, supra at 536.

In the recent case of Sheet Metal Workers International Association, Local 355 v. NLRB, 716 F.2d 1249 (9th Cir., 1983), the Ninth Circuit declined to enforce a Board order where the Board held that a union had violated § 8(b)(1)(A) of the Act by filing a state court lawsuit

Footnote 5/ continued

remanded to determine whether the proofs showed that respondent was a "public official" within New York Times rule); Hormel v. Helvering, 312 U.S. 552, 556-557 (1941) (Because of the intervening decision in Helvering v. Clifford, 309 U.S. 331 (1940), this Court allowed the Commissioner of Internal Revenue to rely on § 22(a) of the Revenue Act of 1934, although the Commissioner's argument before the Board of Tax Appeals had rested solely on §§ 166 and 167); NLRB v. Pittsburgh Steamship Company, 337 U.S. 656, 661-662 (1949) (This Court remanded the case to the court of appeals for further consideration in light of the Administrative Procedure Act, 5 U.S.C. § 1001 et seq., which was enacted after the issuance of the Board's order, where impact of APA was not briefed before the court of appeals or before this Court).

against an employee in retaliation for the employee's filing of an unfair labor practice charge. The court held that, in light of this Court's intervening decision in Bill Johnson's, the Board's order was unenforceable because the Board had failed to determine whether the employer's state court action had a reasonable basis. The Ninth Circuit raised the First Amendment defense sua sponte, where the employer had failed to raise this defense either before the Board or before the court of appeals. Likewise, in the present case, this Court should consider Sure-Tan's First Amendment rights in light of the intervening decision in Bill Johnson's, notwithstanding the fact that Petitioners' did not raise the First Amendment defense in prior proceedings.

2. Petitioners' Conduct Was
 Constitutionally Protected.

Respondent argues that even if Petitioners are not barred from asserting their

Constitutional right to petition the government, Sure-Tan's petition to the INS to investigate the immigration status of its employees does not fall within the ambit of the First Amendment. The Constitutional right to petition the government, Respondent asserts, pertains only to political activity and to civil lawsuits, not to the reporting of violations of the law to law enforcement agencies. (R. Br. 40-41).

Respondent's asserted limitation on the First Amendment right to petition the government is contrary to established law. In Forro Precision, Inc. v. International Business Machines Corp., 673 F.2d 1045, 1059-1060 (9th Cir. 1982), the Ninth Circuit held that the First Amendment right to petition the government applied to IBM's approach to a law enforcement agency which resulted in a police search of a competitor's premises and the indictment of ten individuals. The court observed that:

We do not liken an approach to the police for aid in apprehending wrongdoers to political activity. However, we think that the public policies served by ensuring the free flow of information to the police, although somewhat different from those served by Noerr-Pennington, are equally strong. Encouraging citizen communication with police does not generally promote the free exchange of ideas, nor does it provide citizens with the opportunity to influence policy decisions. Compare Noerr, 365 U.S. at 137-38, 81 S. Ct. at 529-30. Nonetheless, it would be difficult indeed for law enforcement authorities to discharge their duties if citizens were in any way discouraged from providing information. We therefore hold that the Noerr-Pennington doctrine applies to citizen communications with police. Id. at 1060.

Respondent then falls back to the argument that, even if the reporting of a violation of the law constitutes a petition to the government within the meaning of the First Amendment, this Court did not preclude the finding of an unfair labor practice where the First Amendment right to petition the government is involved. Rather, Bill Johnson's only requires the Board to be "sensitive to First Amendment values" in

construing the NLRA. (R. Br. 42). Respondent in effect argues that once the Board has paid nodding obeisance to the First Amendment, it is free to abridge First Amendment rights in situations where the Board concludes that an employer has acted with an improper motive. (R. Br. 42).

This Court, however, did not require mere "sensitivity" to First Amendment rights in Bill Johnson's. Rather, this Court held categorically that, in light of the First Amendment right to petition and the compelling state interest in maintaining domestic peace, a well-founded petition to the government may not be enjoined as an unfair labor practice, even if the action would not have been taken but for the employer's desire to retaliate against an employee. 103 S.Ct. at 2170.^{6/}

^{6/} Respondent maintains that this Court suggested in Quarles, supra, that the right of a citizen to inform a law enforcement

(footnote continued)

Respondent also asserts that the Constitution does not protect the reporting of a crime if the action was "deliberately based upon an unjustifiable standard such

Footnote 6/ continued

agency of the commission of a crime is a privilege that inures to the benefit of the government rather than to the informer personally. The government, Respondent argues, can therefore abridge this Constitutional right in order to accommodate "another compelling 'necessity of the government' as reflected in the NLRA." (R. Br. 42 n. 41). Contrary to Respondent's assertion, this Court stated unequivocally in Quarles that citizens have a right to inform law enforcement agencies of a violation of the law, and the government has the duty to protect that right. The government's duty to protect that right arises both from the interest of the informant and from the necessity of the government itself, which depends for successful law enforcement upon the willingness of citizens to report violations of the law. Id. at 158 U. S. 536. Respondent overlooks the fact that the rights of citizens in this nation are not divorced from the rights of the government; nor are individual rights at the mercy government convenience. By making Constitutional rights subservient to the Board's convenience, the General Counsel continues to "use only its private knothole to view these issues and sees nothing except its own labor goals." (J. Wood, Dissent to Order Denying Sure-Tan's Request for Re-hearing; 38a).

as race, religion or other arbitrary classification." Citing Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978) (quoting Oyler v. Boles, 368 U.S. 448, 456 (1962)), Respondent contends that one such arbitrary classification is "based upon the exercise by employees of rights protected by the NLRA." (R. Br. 43). Bordenkircher and Oyler, however, concerned petitions for writs of habeas corpus filed by prisoners who claimed that conduct by state prosecutors violated their Fourteenth Amendment equal protection and due process rights. The Fourteenth Amendment applies only to state actions, not to actions by individuals who are not acting under the color of state law. Flagg Brothers, Inc. v. Brooks, 436 U.S. 149 (1978). The Fourteenth Amendment erects no shield against merely private conduct. Shelley v. Kraemer, 334 U.S. 1, 13 (1948).

Even if the Fourteenth Amendment were applicable to individuals -- which is clearly

not the case -- individuals who exercise rights protected by the NLRA have not been identified by this Court as an "arbitrary classification" offensive to the equal protection clause of the Fourteenth Amendment.^{7/} Respondent is in effect attempting to elevate the rights created by Congress under the NLRA to the status of Constitutional rights by means of the Fourteenth Amendment. This attempt to incorporate the NLRA into the Fourteenth Amendment is plainly contrary to the Court's holding in Bill Johnson's that the rights created under the NLRA are subordinate to Constitutional rights and must be

^{7/} Petitioner argues that Congress has the power to identify employees who exercise rights protected by the NLRA as an arbitrary classification offensive to the Fourteenth Amendment equal protection clause. Such a suggestion is plainly wrong. It is the role of this Court, not Congress, to interpret the Fourteenth Amendment.

interpreted so as not to abridge Constitutional rights.^{8/}

II. THE BACKPAY AWARD DOES NOT EFFECTUATE THE POLICIES OF THE ACT AND CONFLICTS WITH THE IMMIGRATION LAWS.

A. The Backpay Award Does Not Effectuate The Policies Of The Act.

Respondent argues that the court of appeals' six-month backpay award effectuates the policies of the Act and is therefore appropriate, notwithstanding the blatantly speculative nature of the award. (R. Br. 43-45). On the basis of a Department of Labor study, Respondent asserts that the illegal aliens could have been expected to remain illegally in this country for some unspecified additional period of time in the absence of Sure-Tan's inquiry to the INS. (R. Br. 44 n. 42).

^{8/} Accord, NLRB v. Virginia Electric & Power Co., 314 U.S. 469 (1941) (NLRA cannot abridge freedom of speech guaranteed by First Amendment).

The Department of Labor study provides no basis for the six-month backpay period, nor does it eliminate the speculative nature of the award. Respondent concedes that the six-month period is speculative, but argues, relying upon Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251, 265 (1946), that such speculation is permissible where the uncertainty was occasioned by the employer's actions. (R. Br. 45). This Court observed in Bigelow, however, that: "even where the defendant by his own wrong has prevented a more precise computation, the jury may not render a verdict based on speculation or guesswork." 327 U.S. at 264.

The Board itself recognized that the policies of the Act are not effectuated by such a speculative backpay award. The Board would have tolled the accrual of backpay during the period the illegal aliens were unavailable for work because of

enforced absence from the country. (41a).
In analogous situations, the Board has tolled the accrual of backpay during periods when employees are unavailable for work because of incarceration for criminal violations. Gifford-Hill & Company, 188 N.L.R.B. 337, 338 (1971); Keco Industries, Inc., 121 N.L.R.B. 1213, 1228 (1958).^{9/}

B. The Backpay Award Is Inconsistent With The INA.

Respondent argues that there is no inconsistency between the INA and the NLRA "if the NLRA is applied to the employment relationship entered by an undocumented alien prior to the execution of the statutory remedy of deportation." (R. Br. 22).

^{9/} Respondent cites a number of cases holding that backpay would not be tolled if the employees' unavailability for work is due to illness or injury fairly attributable to the offending employer. American Manufacturing Company of Texas, 167 N.L.R.B. 520, 522-523 (1967) (Backpay period is not tolled during the period of illness

(footnote continued)

There is an inconsistency between the INA and the NLRA, however, if the NLRA is applied to the employment relationship after an illegal alien is deported. The INA specifically calls for the deportation of aliens who unlawfully enter this country

Footnote 9/ continued

attributable to interim employment); Fabric Mart Draperies, Inc., 182 N.L.R.B. 390 (1970) (Backpay not tolled during period when employee was unable to work because of illness which was attributable to the unlawful conduct of the employer); Graves Trucking, Inc., 246 N.L.R.B. 344, 345 (1979), enforced as modified 692 F.2d 470, 474-477 (7th Cir. 1982) (Backpay awarded for a period when employee was recuperating from physical injuries inflicted by a supervisor); Moss Planing Mill Co., 103 N.L.R.B. 414 (1953), enforced 206 F.2d 557 (4th Cir. 1953) (Backpay period was not tolled where the employee's incapacity to work was caused by the physical injury inflicted upon him by the employer).

None of these cases involve unavailability for work attributable to an employee's arrest for a violation of the law. In more analogous cases, the Board has tolled backpay where the unavailability for work is occasioned by the employee's arrest or incarceration for a violation of the law. Gifford-Hill & Company, 188 N.L.R.B. 337, 338 (1971); Keco Industries, Inc. 121 N.L.R.B. 1213, 1228 (1958).

or who enter lawfully and fail to maintain their lawful status. 8 U.S.C. 1251(a)(2) and (9). By applying the NLRA to the illegal aliens after their deportation, and awarding them backpay for a period of time when they were in Mexico and unable to lawfully reenter this country, the Board creates a fundamental conflict between the INA and the NLRA; in effect, the Board treats the INA as if it were of no consequence.^{10/}

Respondent attempts to sidestep this conflict by suggesting that the backpay

^{10/} Respondent argues that the inability of the Board to provide an effective remedy would invite a repetition of acts of discrimination in the future and undermine the rights of Petitioners' non-alien employees. (R. Br. 43). The Board, however, is not authorized to impose arbitrary, punitive remedies under any circumstances. (See P. Br. at 24-28). If it be assumed, contrary to fact, that Petitioners' inquiry to the INS constituted an unlawful constructive discharge, Respondent could order backpay in accordance with normal Board procedures, which would call for tolling of backpay during periods when the aliens were unavailable for work. See pages 26-28, supra.

award vindicates public rather than private rights. (R. Br. 46). Regardless of the rights which are vindicated, there is no escaping the fact that the purpose of the INA is flouted by treating illegal aliens as though they had a right to remain in this country illegally for another six months after their deportation and rewarding them for their illegal presence in this country with six-months' backpay.^{11/}

III. THE COURT OF APPEALS' DECISION
REGARDING THE OFFERS OF REINSTATE-
MENT IS UNREASONABLE AND CONTRARY
TO BOARD PRECEDENT.

Respondent acknowledges that the court of appeals improperly usurped the role of

11/ Respondent argues that the backpay award would not encourage illegal immigration because the illegal aliens would be entitled to the backpay regardless of their presence in this country. The court of appeals and the Board's own General Counsel, however, recognize that a backpay award would provide an incentive for the aliens to reenter the country illegally. (18a; 55a).

the Board by enlarging the Board's remedial order rather than remanding the order to the Board for reconsideration. Respondent nevertheless contends that the court's expanded remedial order, which requires Sure-Tan to send reinstatement offers to the aliens written in Spanish by method allowing verification of receipt and to leave the reinstatement offers open for four years, reasonably effectuates the purposes of the Act. (R. Br. 47).

Respondent relies on Carruthers Ready Mix, Inc., 262 N.L.R.B. 739 (1982); Monroe Feed Store, 122 N.L.R.B. 1479, 1480-1481 (1959); and Rutter-Rex Manufacturing Company, 158 N.L.R.B. 1414, 1424 (1966), enforced as modified, 399 F.2d 356 (5th Cir. 1968), reversed as to modification, 396 U.S. 258 (1969), to support the requirements that the reinstatement offers be made in Spanish and be sent in a manner permitting verification of receipt. (R. Br. 48). None of

these cases, however, require that reinstatement offers be made in an employee's native language. Nor do these cases require that reinstatement offers be sent in a manner permitting verification of receipt.

In contrast, General Iron Corp., 218 N.L.R.B. 770 (1975), enforced 538 F.2d 312 (2d Cir. 1976), (discussed in Petitioners' Brief at 31), specifically holds that reinstatement offers to Spanish-speaking employees need not be written in Spanish or sent by means permitting verification of receipt.^{12/}

Respondent attempts to justify the court of appeals' requirement that the offers of reinstatement be kept open for

^{12/} Respondent argues that the Board in General Iron Corp., supra, noted that Spanish-speaking employees who receive an English reinstatement offer often consult an English-speaking child, friend or neighbor to read the letter, which would be impractical if the employee has returned to Mexico. It is certainly not unreasonable, however, for an employer to write a reinstatement offer

(footnote continued)

four years on the grounds that it may take the illegal aliens four years to obtain visas to legally reenter the country.

According to information provided to Respondent by the INS, however, no visas are available for nonpreference aliens such as those in the present case. (R. Br. 49 n. 47).

Thus, there is no reasonable relationship whatever between the four year reinstatement period and the time required for the illegal aliens to reenter this country lawfully.

Footnote 12/ continued

in English when it has communicated verbally with the employees in English throughout the time they worked for the employer. Furthermore, as noted by the Board: "Some individuals who cannot readily speak English often can read that language. An offer to return to work does not require any great knowledge of the English language to be understood." Id. at 770-771. The Board also noted that the fact that a reinstatement offer is not sent by registered mail, return receipt requested, does not invalidate the offer. Rather, the issue of proof of service is a matter to be determined in the compliance stage. Id. at 771.

Relying on Fredeman's Calcasieu Locks Shipyard, Inc., 208 N.L.R.B. 839 (1974), Respondent argues that a reasonable time for a reinstatement offer to remain open depends upon the circumstances affecting the individual employee at the time of receipt of the offer. In the present case, the circumstances are that the illegal aliens in question are unskilled laborers who may never obtain visas to reenter this country legally. Those circumstances cannot be changed, and do not provide a reasonable basis for treating the aliens with greater deference than American citizens.^{13/} The 30-day period for which Petitioners' offers were held open accords with established Board precedent and should be upheld.

^{13/} Cf., Keco Industries Inc., supra at 1227 (Special provision should not be made for a reinstatement offer to an employee who was unavailable for work by reason of incarceration).

CONCLUSION

For the foregoing reasons, and the reasons advanced in Petitioners' Brief, the decision of the Board and the decision of the court of appeals, holding that Petitioners' inquiry to the INS was an unlawful constructive discharge, should be reversed. This case should be remanded to the court of appeals with instructions to modify the decree of enforcement to exclude the requirement that the illegal aliens be reinstated with backpay. If this Court holds that Sure-Tan's request to the INS violated Section 8(a)(3) of the Act, the enforcement decree should be modified to require the tolling of the accrual of backpay during the periods the aliens were unavailable for work because of enforced absence from the country. The decree should be further modified to exclude the requirement that

Sure-Tan send revised reinstatement offers
to the aliens.

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MOTION FILED
AUG 22 1983

No. 82-945

IN THE
Supreme Court of the United States
OCTOBER TERM, 1983

SURE-TAN, INC. and SURAK LEATHER COMPANY,

Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

**MOTION FOR LEAVE TO FILE AND BRIEF OF THE
ASIAN AMERICAN LEGAL DEFENSE AND EDUCATION
FUND AND THE ASIAN LAW CAUCUS AS AMICI CURIAE**

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1983

No. 82-945

SURE-TAN, INC. and SURAK LEATHER
COMPANY,

Petitioners,

-against-

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit

MOTION OF THE ASIAN AMERICAN LEGAL
DEFENSE AND EDUCATION FUND AND THE
ASIAN LAW CAUCUS FOR LEAVE TO FILE
BRIEF AMICI CURIAE

The Asian American Legal Defense and
Education Fund and the Asian Law Caucus
respectfully move, pursuant to Rule 42 of
this Court's rules, to file a brief as
amici curiae. Counsel for the respondent
has consented to the filing of this brief;
Sure-Tan, Inc. refused our request for

consent.*

The Asian American Legal Defense and Education Fund is a national organization of attorneys, law students and legal workers committed to protecting the civil rights of Asian Americans through litigation and community education.

The Asian Law Caucus is a non-profit organization formed to protect the rights of Asian Americans in employment, housing, immigration, government benefits and criminal justice by providing legal and educational services.

The issues in this case have broad significance for the Asian American community. Amici are particularly concerned

* Copies of the letters from counsel for the respondent and counsel for Sure-Tan, Inc. are being lodged with the Clerk.

that the National Labor Relations Act continues to protect undocumented workers. Such protection is necessary for undocumented workers as well as documented workers to assert their rights to organize. Moreover, the exclusion of undocumented workers from the Labor Act's protection will adversely impact on Asian American communities.

Since the ramifications of these issues extend beyond the particular case before the Court, we seek the opportunity to present our views on this matter and respectfully move for leave to file this brief.

Respectfully submitted,

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August 12, 1983

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1983

No. 82-945

SURE-TAN, INC. and SURAK LEATHER
COMPANY,

Petitioners,

-against-

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit

BRIEF OF THE ASIAN AMERICAN LEGAL DEFENSE
AND EDUCATION FUND AND THE ASIAN LAW
CAUCUS AS AMICI CURIAE

INTEREST OF AMICI

The Asian American Legal Defense and
Education Fund, Inc. (AALDEF), is a non-
profit corporation established in 1974
under the laws of the State of California

and New York. It was formed to protect the civil rights of Asian Americans throughout the nation through the prosecution of lawsuits and the dissemination of public information.

The Asian Law Caucus, Inc., is a non-profit corporation established under the laws of the State of California in 1972. It was formed to assist Asian Americans in the Greater San Francisco Bay Area in the protection of their rights in employment, housing, immigration, governmental benefits and criminal justice by providing legal and educational services.

In the last fifteen years, Asian immigration to the United States has dramatically increased. While Asians now comprise one-third of the legal immigra-

tion to this country,^{1/} a number of Asians reside as undocumented aliens. Amici's experience has shown that Asian undocumented aliens suffer from the most extreme forms of exploitation in all aspects of their daily lives, which merely compounds the burdens of race and national origin discrimination that continue to disadvantage Asian Americans in general. Because undocumented workers are particularly vulnerable to exploitation, amici view with great concern any decision which would further strip these workers of their rights to seek legal redress.

1. See Pian, Consultation Focus: Identification of Issues, in Civil Rights Issues of Asian and Pacific Americans: Myths and Realities 11 (1979) (hereinafter "Civil Rights Issues"), citing Annual Reports of the Immigration and Naturalization Service.

STATEMENT OF THE CASE

Petitioners Sure-Tan, Inc. and Surak Leather Company ("Sure-Tan") are two small leather processing and sales firms located in Chicago, Illinois. Both firms are operated by Steve and John Surak. They employed eleven Mexican workers, most of whom had no visas or work permits. A union organizing drive began at Sure-Tan in July, 1976, and eight employees signed cards authorizing the Chicago Leather Workers Union, Local 431, Amalgamated Meatcutters and Butcher Workers of North America (the "union") to act as their collective bargaining representative.

The day following the union's certification, John Surak wrote the Immigration and Naturalization Service ("INS") and asked it to investigate the status of several employees. On February 18, 1977,

INS agents visited the company's plants, found that five employees were illegally in the United States, and arrested them. The employees chose not to be deported and voluntarily departed from the country.

The National Labor Relations Board (the "Board") found that the petitioners violated sections 8(a)(1) and (3) of the National Labor Relations Act ("NLRA" or "Labor Act") by requesting the INS investigation, since it led to the departures of five employees solely because they supported the union. Sure-Tan, Inc., 234 N.L.R.B. 1187, 1187 (1978). The Board recognized that aliens are "employees" under section 2(3), 29 U.S.C. § 152(3), and therefore protected under the Act. The Board also found that the employees' forced departures constituted "constructive discharges" by Sure-Tan. Id. To remedy the unlawful con-

structive discharges, the Board ordered the usual remedies of reinstatement and back-pay. Id. at 1187-88.

The court of appeals upheld the Board's findings of unfair labor practices and agreed that the petitioners had constructively discharged the employees.

N.L.R.B. v. Sure-Tan, Inc., 672 F.2d 592, 602 (7th Cir. 1982). It modified the Board's order to require petitioners to reinstate the discriminatees only if they were "legally present and legally free to be employed in this country when they offered themselves for reinstatement."

Id. at 606. The court also modified the Board's order to make clear "(1) that . . . in computing backpay discriminatees will be deemed unavailable for work during any period when not lawfully entitled to be present and employed in the United States

and (2) that backpay need not be placed in escrow for more than one year." Id. However, because it was possible that the discriminatees would not be lawfully available for employment in the United States prior to the date of the new offers of reinstatement, and thus would receive no backpay, the court ordered that employees should receive a minimum of six months' backpay. Id. The court found six months to be a reasonable estimate of the minimum time during which the discriminatees might reasonably have remained employed without apprehension by the INS, but for the employers' unfair labor practice. Id.

A petition for a writ of certiorari was granted by this Court on March 7, 1983.

SUMMARY OF ARGUMENT

There is no inherent conflict between the general policies of the NLRA and the Immigration and Nationality Act ("INA") by extending labor law protection to undocumented workers. The exclusion of undocumented workers from NLRA protection will undermine the purposes of the NLRA by giving employers a new weapon to decertify validly elected unions or to break lawful union strikes. Thus, extending Labor Act coverage to undocumented workers is essential to protect the efforts of American citizens and legal resident aliens to exercise their NLRA rights. Moreover, NLRA protection of undocumented workers serves the policy of the INA by removing the incentives which encourage employers to prefer undocumented aliens over other workers.

Exclusion of undocumented aliens from

NLRA protection will have a chilling effect on the growing labor movement in Asian American communities. Due to language and cultural barriers, Asian workers are often unaware of their legal rights at the workplace. By stripping undocumented aliens of their protection under federal labor laws, Asian workers, both citizens and legal resident aliens, may be deterred from exercising their rights to organize and join unions.

ARGUMENT

- I. LABOR LAW PROTECTION OF UNDOCUMENTED WORKERS IS CONSISTENT WITH THE GOALS AND PURPOSES OF THE NATIONAL LABOR RELATIONS ACT, AND SUCH PROTECTION OF UNDOCUMENTED ALIENS DOES NOT CONFLICT WITH THE IMMIGRATION AND NATIONALITY ACT.

Whether or not the NLRA, by its own terms, protects undocumented workers

depends on the definition of "employee," because the NLRA protects only "employees" from "unfair labor practices."^{2/} Under the definition of employees, undocumented workers are not categorically excluded from coverage.^{3/} Since the term "employee"

2. National Labor Relations Act § 2(3), 29 U.S.C. § 152(3) (1976).

3. The section reads in pertinent part:

The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with any current labor dispute, or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment but shall not include any individual employed as an agricultural laborer, or in the domestic service to any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status (footnote continued on next page)

is defined by listing specific exclusions, and undocumented workers are not categorically excluded, undocumented aliens can be inferred to be included in the Act.

Additionally, there is nothing in the legislative history of the Labor Act to suggest that undocumented workers were meant to be excluded. In sparse discussions over the definition of employee, it was said that "employee" was meant to include anyone who is on the "pay-roll."^{4/}

(footnote continued from previous page)

of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act . . . or by any other person who is not an employer as herein defined.

National Labor Relations Act § 2(3), 29 U.S.C. § 152(3) (1976) (incorporating amendments of Labor Management Relations Act, 1947, ch. 120, § 101, 61 Stat. 136).

4. 79 Cong. Rec. 9686 (1935) (remarks of Rep. Taylor and Rep. Connery, Chairman of the Committee on Labor).

Since there is no indication that Congress intended to exclude undocumented workers from the definition of employee, they should be given employee status if such coverage is consistent with the purposes of the NLRA.

A. Exclusion of Undocumented Workers from the Coverage of the National Labor Relations Act Would Undermine the Purposes of the Act.

The purposes of the NLRA are to engender industrial harmony by facilitating collective bargaining and to equalize the bargaining power between employees and employers.^{5/} These goals have been recognized by this Court:

The enactment of the NLRA in 1935 marked a fundamental change in the Nation's labor policies. Congress expressly

5. S. Rep. No. 573, 74 Cong., 1st Sess. 1-3 (1935); see National Labor Relations Act § 1, 29 U.S.C. § 151 (1976) (Findings and Declaration of Policy).

recognized that collective organization of segments of the labor force into bargaining units capable of exercising economic power comparable to that possessed by employers may produce benefits for the entire economy in the form of higher wages, job security, and improved working conditions.

Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters, 436 U.S. 180, 190 (1978). Excluding undocumented workers from the Labor Act's definition of "employee" would hinder the exercise of rights by citizens and properly documented alien employees,^{6/} thereby "undermin[ing] Congress's objectives in enacting the NLRA."^{7/}

6. Case Comment, Illegal Aliens as "Employees" under the National Labor Relations Act, 68 Geo. L.J. 851, 863 (1980).

7. Note, Retaliatory Reporting of Illegal Alien Employees: Remediating the Labor-Immigration Conflict, 80 Colum. L. Rev. 1296, 1298 (1980).

This interference manifests itself in many contexts. For example, the denial of employee status to undocumented workers would disrupt the representative union election process, particularly in those industries where a large number of undocumented aliens are employed. Since undocumented workers are virtually indistinguishable from undocumented workers, undocumented workers will inevitably participate in these representative elections. Thus, if undocumented workers are excluded from the Act, the losing party--either the employer or the prospective union--would seek to invalidate the election results and would most likely succeed.

A concrete example of this danger was provided in N.L.R.B. v. Sure-Tan, Inc., 583 F.2d 355 (7th Cir. 1978). Six of the seven voting employees were undocumented

workers. Without the support of those six, the single worker legally within the United States would be powerless. As the Sure-Tan court indicated, invalidating representation elections because undocumented workers participated in the election would give employers a new weapon with which to disrupt union organizing efforts. Id. at 360.

Moreover, exclusion of employee status to undocumented workers would significantly shift the balance of bargaining power to the employer. In workplaces where significant numbers of undocumented workers are employed, the availability of sufficient non-unionizable workers would eliminate the power of the strike in the bargaining process. Employers could freely coerce undocumented workers and prevent them from participating in lawful strike actions, thus insulating themselves from the

potential threat of a strike. To the extent that the union's power in bargaining is dependent on speaking as a collective voice for all those in the workplace, the exclusion of undocumented workers would serve to diminish the union's strength and make it more difficult for the union to bargain for higher wages, better working conditions and job security. The extension of employee status to undocumented workers, thereby giving them protection under the NLRA, is essential to protect the efforts of American citizens and properly documented alien workers to exercise their NLRA rights. Thus, NLRA protection of undocumented workers is consistent with the Act's goals of achieving industrial peace by facilitating collective bargaining and reducing the disparity in bargaining power between workers and employers.

B. The Extension of Employee Status to Undocumented Workers Does Not Conflict With the Underlying Policies of the Immigration and Nationality Act.

Although NLRA protection of undocumented workers is fully consistent with the goals and purposes of the NLRA, such protection should not directly conflict with the clear proscription found in other federal statutes. Southern Steamship Co. v. N.L.R.B., 316 U.S. 31, 47 (1942). "Frequently, the entire scope of congressional purpose calls for careful accommodation of one statutory scheme to another." Id. at 47.

It has been argued that such protection of undocumented workers directly conflicts with U.S. immigration policy as embodied in the Immigration and Nationality

Act.^{8/} Objections against including undocumented workers as "employees" are not based on conflict with any specific immigration provision. Rather the objection is based on a more generalized notion that the intent of the INA is not to bestow benefits and protections to a class of workers who entered the United States illegally or who worked without authorization. Thus, it has been argued that when the NLRA is read alongside the INA, the NLRA should be interpreted to exclude undocumented workers from its protection. However, upon closer examination of the policies of both the NLRA and the INA, "the conflict between the two acts is more

8. Apollo Tire, Inc. argued in N.L.R.B. v. Apollo Tire Co., Inc., 604 F.2d 1180, 1182 (9th Cir. 1979) that "Congress, mindful of a restrictive immigration policy when it enacted the NLRA to govern relations between management and employees, intended to exclude aliens working without proper authority in the United States from the coverage of the Act."

theoretical than real."^{9/}

One of the primary purposes behind the enactment of the INA was to protect domestic labor markets from the harmful effects of massive and uncontrolled influxes of foreign nationals.^{10/} Section 212(a)(14) specifically provides for the exclusion of aliens if the Secretary of Labor has determined that there are sufficient available American workers who

9. Case Comment, supra note 6, at 864.

10. This was declared to be one of the "great purposes" of the immigration acts. Karnuth v. United States, 279 U.S. 231, 243 (1929). See also H.R. Rep. No. 1365, 82nd Cong., 2d Sess. (1952), reprinted in 1952 U.S. Code Cong. & Ad. News 1653, 1705. ("It is the opinion of the Committee that this provision will adequately provide for the protection of American labor against an influx of aliens entering the United States for the purpose of performing skilled or unskilled labor where the economy of the individual localities is not capable of absorbing them at the time they desire to enter this country.")

are able, willing and qualified to perform such skilled or unskilled labor and that the employment of such aliens will adversely affect the wages and working conditions of workers in the U.S. similarly employed.^{11/}

However, labor law protection of undocumented aliens conflicts neither with the INA nor with its underlying policy of protecting American labor. In fact, such protection furthers the policies of the INA.^{12/} Because the wages of unionized workers are higher, employers often hire

11. Immigration and Nationality Act § 212 (a)(14), 8 U.S.C. § 1182(a)(14) (1976); Peskioff v. Secretary of Labor, 501 F.2d 757, 761 (D.C. Cir.), cert. denied, 419 U.S. 1038 (1974) (alien has the burden of proving no adverse effect on wages and working conditions of American citizens).

12. See generally Kutchins & Tweedy, No Two Ways About It: Employer Sanctions Versus Labor Law Protections for Undocumented Workers, 5 Indus. Rel. L.J. 247 (1982); see Note, supra, note 7, at 1922; see Case Comment, supra note 6, at 865.

undocumented workers who cannot organize themselves. "By insuring that undocumented workers are not more attractive to potential employers than legal resident workers, labor law protection suppresses demand for alien workers."^{13/} The more undocumented workers are treated like the other workers, the less impetus employers will have to hire undocumented workers. Therefore, NLRA protection of undocumented aliers actually favors citizens and legal aliens in the domestic workforce, and thus, such protection best furthers the policies underlying the immigration laws.

The circuit courts which have addressed this important issue have consistently and persuasively argued that upholding labor

13. Note, supra note 7, at 1299.

law protection for undocumented workers will further immigration policy. In N.L.R.B. v. Sure-Tan, Inc. ("Sure-Tan I"), the court held that certification based on votes by six undocumented workers did not conflict with federal immigration laws, particularly 8 U.S.C. § 1182(a)(14). 583 F.2d 355 (7th Cir. 1978). Sure-Tan I arose from the same events which led to the present case. After Sure-Tan called the INS to deport the six undocumented workers who had voted for the union, the company sought to invalidate the election on the grounds that six of the seven voters were undocumented workers.

The court flatly rejected the company's argument that certification improperly conflicted with federal immigration laws. Id. at 359. After analyzing how the policies underlying the immigration laws

could best be advanced in such circumstances, the court concluded:

declining to certify this Union could only have the effect of encouraging violations of the immigration laws . . . If a company can avoid certification merely by hiring aliens, undoubtedly some companies will choose to hire such aliens in order to gain immunity from labor unions . . . Thus by refusing to certify unions with a majority of alien members we would be giving employers an extra incentive to hire aliens and thus would be defeating the goals of the immigration laws." Id. at 360.

Similarly, the Ninth Circuit, in N.L.R.B. v. Apollo Tire Co., Inc., 604 F.2d 1180 (9th Cir. 1979) held that the NLRB properly ordered reinstatement of employees who had been laid off in violation of the NLRA, even though these employees were undocumented workers. The court rejected the company's argument that the Board's order improperly conflicted

with the spirit of a restrictive immigration policy and concluded to the contrary:

Were we to hold the NLRA inapplicable to illegal aliens, employers would be encouraged to hire such persons in hope of circumventing the labor laws. The result would be more work for illegal aliens and violations of the immigration laws would be encouraged.

Id. at 1183.

In conclusion, there is no inherent conflict between the general policies of the NLRA and the INA. Neither the general policy of the INA nor any of its specific provisions are violated by granting undocumented workers "employee" status and its consequent NLRA protection. To the contrary, the exclusion of undocumented aliens from the NLRA's definition of "employee" would undermine policies of protecting the American resident workers clearly protected under the NLRA.

II. NLRA PROTECTION OF UNDOCUMENTED WORKERS IS ESSENTIAL TO PREVENT THE DETRIMENTAL CHILLING EFFECT ON LABOR ORGANIZING IN ASIAN AMERICAN COMMUNITIES.

Although the total number of Asian undocumented aliens is unknown, at least 9,500 to 16,000 have been apprehended annually by the INS over the past few years. Most Asian undocumented aliens enter the country with valid entry documents but subsequently violate the terms of their visas.^{14/}

Many live in densely-populated Asian American communities in urban areas throughout the country. They struggle in low-paying jobs with long working hours, often as garment factory and rest-

14. See North, Asia-Pacific Illegal Aliens: A Discussion of their Status, Limitations, and Rights Under the Law, Civil Rights Issues, supra note 1, at 238-39.

aurant workers.^{15/} Fearful of reprisals by their bosses, Asian undocumented workers hesitate to complain about their employers' frequent refusals to pay minimum wage or overtime compensation and avoid participating in organizing efforts to secure better working conditions.^{16/} Some employers prey

15. Because of historical patterns of employment discrimination, many Asian Americans have not sought work in the general labor market. Instead, they have been confined primarily to employment in the restaurant, laundry and garment industries. While the number of Chinese laundries has declined significantly in recent years because of competition from large mechanized operations, a majority of Asian immigrants--both legal and undocumented workers--continue to be employed in restaurants and garment factories. T. Sowell, *Ethnic America: A History* 150 (1981); B. Sung, *A Survey of Chinese-American Manpower and Employment* 81-83 (1976). A typical Chinese restaurant worker in New York City works over 60 hours a week but earns only \$220 per month.

16. See generally Presentation of David North, Director, Center for Labor and Migration Studies, New TransCentury Foundation, Washington, D.C., in *Civil Rights* (footnote continued on next page)

on their fears, often intimating to discontented workers that they will be deported.^{17/} Many employers prefer hiring undocumented workers for the very reason that these workers can be controlled and will have nowhere to turn for justice.^{18/}

In the past two years, the Asian American Legal Defense and Education Fund has been involved in several significant labor events in New York City: the formation of the first independent Asian rest-

(footnote continued from previous page)

Issues, supra note 1, at 178-83; Presentation of David Ilumin, Director, West Bay Multi-Service Corporation, San Francisco, California, in Civil Rights Issues, id. at 574-84.

17. See Wong, Asian/Pacific American Women: Legal Issues, in Civil Rights Issues, id. at 144.

18. See Buck, The New Sweatshops: A Penny for Your Collar, reprinted in Selected Readings on U.S. Immigration Policy and Law 34 (1980).

aurant workers' union; the successful unionization drives at five Chinese restaurants,^{19/} a series of minimum wage suits brought against the restaurant owners; and the June 1982 rally of over 15,000 Chinatown garment workers demanding renewal of their International Ladies Garment Workers Union contract.^{20/} These recent developments signal a rising labor consciousness within the Asian community and a growing willingness among Asian workers to assert their legal rights to decent wages and working conditions.

Exclusion of undocumented aliens from NLRA protection will have a chilling effect

19. The five restaurants are Silver Palace, Szechuan Taste, Beansprout, Hawaii Kai and Hong Gung Restaurant. In each of these cases, AALDEF either represented individual workers at the union elections or represented the independent restaurant workers' union at contract negotiations.

20. See N.Y. Times, July 16, 1982, at B3, col. 1.

on the growing labor movement in Asian American communities. Due to language and cultural barriers, many Asians, both documented as well as undocumented aliens, lack a fundamental understanding of their legal right to participate in unionization drives or even to demand minimum wage.²¹ Moreover, many Asian lawful permanent residents are mistakenly discouraged from exercising their right to organize because of their unfounded fear of jeopardizing their lawful immigration status. Thus, if undocumented workers are stripped of their NLRA protection,

21 Other factors, most notably the historical discriminatory practices of some unions prevented Asians and other minorities from joining these unions. See United Steelworkers of America, AFL-CIO-CLC v. Weber, 443 U.S. 193, 200, note 1 (1979). Lack of protections of undocumented minority workers under the NLRA could serve to perpetuate the impact of those practices.

both documented and undocumented workers will be even more afraid to speak out against their oppressive working conditions.

Moreover, employers will pit undocumented against documented employees for limited jobs and will utilize such divisions to defeat organizing campaigns in Asian restaurants and garment factories. Therefore, premising labor rights upon an individual's immigration status undermines the right to organize among all employees, regardless of their immigration status.

CONCLUSION

For the reasons set forth above, the judgment of the court below should be affirmed.

Respectfully submitted,

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No. 82-945

IN THE
Supreme Court of the United States

OCTOBER TERM, 1982

SURE-TAN, INC. AND SURAK LEATHER COMPANY,
Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

On Writ of Certiorari to the United States Court of Appeals
for the Seventh Circuit

MOTION FOR LEAVE TO FILE A BRIEF AS
AMICUS CURIAE AND BRIEF AMICUS CURIAE FOR
THE AMERICAN FEDERATION OF LABOR AND
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**On Writ of Certiorari to the United States Court of Appeals
for the Seventh Circuit**

**MOTION BY THE AMERICAN FEDERATION OF LABOR
AND CONGRESS OF INDUSTRIAL ORGANIZATIONS
FOR LEAVE TO FILE A BRIEF AMICUS CURIAE**

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) respectfully moves this Court for leave to file the accompanying brief *amicus curiae* in support of the position of the respondent in this case.

**INTEREST OF THE AMICUS CURIAE AND ISSUES
TO BE COVERED IN THE BRIEF AMICUS CURIAE**

The AFL-CIO is a federation of 97 national and international unions having a total membership of approximately 13,500,000 working men and women. This motion is filed because petitioner has not granted consent for filing a brief *amicus curiae*.

This case involves the intersection of the national labor policy, which protects the right of employees to organize for purposes of collective bargaining, with the policies of the Immigration and Nationality Act (INA) to protect the job opportunities and labor standards of American workers by sharply limiting the entry of aliens to perform labor in the United States. In this case the Employer knowingly employed Mexican nationals who were subject to exclusion from the United States under the immigration laws. After these employees had voted to be represented by a union, the Employer caused the Immigration and Naturalization Service to remove them from the United States. The National Labor Relations Board found that the Company did so in retaliation for their union activities, and determined that the Employer had thereby violated §§ 8(a) (1) and 8(a) (3) of the National Labor Relations Act (NLRA). The Employer defends his conduct here primarily by contending that the NLRB's unfair labor practice finding, and the remedy as approved by the court of appeals, are inconsistent with the policies of the immigration laws. Although the Employer was perfectly willing to employ Mexican nationals rather than American workers until the former voted for union representation, the Company now argues that the decision below is contrary to the interests of American workers. Pet. Br. 15.

The interest of the AFL-CIO in this case is that this cynical argument be rejected. Our brief demonstrates that the asserted conflict between the NLRA and the INA is spurious: Both statutes are designed to protect the interests of American workers. Reversal of the decision below would encourage the employment of illegal aliens rather than American workers because the aliens would henceforth be afraid of choosing union representation, thereby enabling their employers to be immune from unionization.

CONCLUSION

For the above-stated reasons, this motion for leave to file an amicus curiae brief should be granted.

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**On Writ of Certiorari to the United States Court of Appeals
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**BRIEF AMICUS CURIAE FOR THE
AMERICAN FEDERATION OF LABOR AND
CONGRESS OF INDUSTRIAL ORGANIZATIONS**

This brief *amicus curiae* is filed contingent on the granting of the foregoing motion for leave to file said brief. The interest of the *amicus curiae* in this case is set forth in that motion.

SUMMARY OF ARGUMENT

On the day after it was notified that a union had been certified as the collective bargaining representative of its employees, petitioner Sure-Tan wrote a letter to the Immigration & Naturalization Service ("INS") which questioned the immigration status of a majority of its employees, (who were in fact Mexican nationals) and ultimately caused the removal of five of those employees from

the United States. The National Labor Relations Board ("Board") determined that this conduct, which occurred against the background of widespread illegal interference by the Company with its employees' organizational rights under the National Labor Relations Act ("NLRA"), constituted a constructive discharge of these employees because of their support for the union and thereby violated §§ 8(a)(1) and 8(a)(3) of the NLRA.

The Company's principal contention in challenging that finding and in resisting the award of reinstatement and backpay to these five employees is that the decision below conflicts with the policies of the Immigration and Nationality Act ("INA"). The Company's contention is without merit; indeed, as we show in our agreement, it would undermine the policies of the INA, as well as those of the NLRA, to excuse the Company's conduct.

I. As this Court has long recognized, one of the "great purposes" of Congressional policy to restrict immigration has been "to protect American labor against the influx of foreign labor." *Karnuth v. United States*, 279 U.S. 231, 243. While the employment of illegal aliens has a severe adverse impact on the employment opportunities and wage standards of American workers, *De Canas v. Bica*, 424 U.S. 351, 356-357, it is attractive to the aliens because of the disparity between even the lowest-paying jobs in the United States and the wages available in their country of origin. For their part, unscrupulous employers have a strong economic incentive to seek out illegal aliens "as a source of cheap labor." See *Plyler v. Doe*, 457 U.S. 202, 218-2193.

Sure-Tan's argument that it is being penalized "for reporting a suspected violation of the law" (Pet. Br. 16) depends on artificially isolating the action which the Company took to cause the termination of the aliens' employment from the entire prior relationship, and from its motive for the report. Sure-Tan made no inquiry concern-

ing the immigration status of these Mexican nationals in hiring them; nor did the Company report these employees to the INS upon learning "several months *before* the election that 'these men were illegally here.'" (672 F.2d 592, 600, emphasis in original). On the contrary, Sure-Tan continued to benefit from the fruits of their labor, and reported these employees to the INS only after the union had been certified. As the court below observed:

There seems nothing like a successful union election to concentrate an employer's mind on the color of its workers' visas (if they exist) and on its moral obligations to expel its (once faithful) employees from the country. [672 F.2d at 601, n.14.]

It is only in these circumstances, in which the employer's NLRA-prohibited motivation is patent, that the decision below proscribes an employer from reporting his employees to the INS.

If the Company's conduct herein is immunized by the INA, the policies of that Act, and the American workers whom the INA is designed to protect would inevitably suffer. As the court below said, it "would encourage employers to hire illegal aliens, who would for all practical purposes be stripped of NLRA protection and who could be fired with impunity at the first hint of union sympathy." 672 F.2d at 601; see also *N.L.R.B. v. Sure-Tan, Inc.*, 583 F.2d 355, 360 (C.A. 7); *N.L.R.B. v. Apollo Tire Co., Inc.*, 604 F.2d 1180, 1183 (C.A. 9); *Gates v. Rivers Construction Co., Inc.*, 515 P.2d 1020, 1022 (Sup. Ct., Alaska).

The Company invokes the line of decisions culminating in *Bill Johnson's Restaurants, Inc. v. NLRB*, — U.S. —, 51 L.W. 4636 (May 31, 1983), which have construed federal statutes narrowly to avoid serious questions of interference with the First Amendment right to petition for redress of grievances. These cases provide the Company with no support, because Sure-Tan was re-

addressing no grievance in causing the removal of its employees from the United States. Unlike, for example, Bill Johnson's Restaurants, which had brought a state court suit not only to interfere with its employees' organizational rights, but also to protect its own reputation, Sure-Tan acted solely to achieve ends prohibited by the NLRA. Here the Company was only "aggrieved" by the presence of the five Mexican nationals when those employees had the temerity to vote for union representation. Moreover, whereas in *Bill Johnson's Restaurants* the Court recognized a countervailing State interest in allowing the employer's defamation action, here the policies of the INA would be defeated by immunizing Sure-Tan's conduct.

II. The award of a minimum of six-months' backpay to the five individual discriminatees is consistent with well-established NLRA remedial principles. While a discriminatee is not entitled to backpay when he is unavailable for work, his backpay does continue to accrue if that unavailability is due to the unfair labor practice itself. Here, the employees' removal from the United States was caused by the unfair labor practice, and there is a reasonable assumption that, but for the Company's letter to the INS, they would have remained in the country, and in the Company's employ for at least six months. It is only for this limited period that these individuals can receive back pay if they remain outside the United States, and reinstatement is not required unless the discriminatee gains lawful reentry to this country. Thus, contrary to the Company's contention, there is no conflict between this remedy and the immigration laws.

The Company's other objections to the order present no question meriting this Court's attention and the writ of certiorari should be dismissed with respect to Question 4 raised by the petition.

ARGUMENT

I

A. We adopt the Court of Appeals' summary of the factual background of this case:

Respondent Sure-Tan, Inc., and Surak Leather Company ("Sure-Tan") are two small leather processing and sales firms located in Chicago, Illinois. Both firms are owned and operated by Steve and John Surak, and at the times relevant to this case they employed approximately eleven workers. Most of these employees were Mexican nationals in the United States without visas or work permits. A union organization drive began at Sure-Tan in July, 1976, and eight employees signed cards authorizing the Chicago Leather Workers Union, Local 431, Amalgamated Meatcutters and Butcher Workmen of North America (the "Union") to act as their collective bargaining representative. On August 12, 1976 the Union filed an election petition with the [National Labor Relations] Board and an election was held on December 10, 1976. The Union won the election, and on January 19, 1977, the Board notified Sure-Tan that its objections were overruled and that the Union was certified as the employees' collective bargaining representative [672 F.2d at 592 and 595-596, footnotes omitted.]¹

The questions before this Court arise from Sure-Tan's drastic response to the Board's notification that the Union had been certified: Sure-Tan constructively discharged five of its employees by causing the Immigration and Naturalization Service ("INS") to remove these employees from the United States as illegal aliens.² In challenging

¹ As the Court of Appeals observed, the Board had found that Sure-Tan, Inc. and Surak Leather Co. constituted a single integrated employer, *Sure-Tan, Inc.*, 234 NLRB 1181, 1189, affirmed on this point, *N.L.R.B. v. Sure-Tan, Inc.*, 583 F.2d 355, 358 (C.A. 7), hereafter "*Sure-Tan I.*" See 672 F.2d at 595, n.1.

² Sure-Tan's continued denial (Pet. Br. 13-15) that the Company constructively discharged these employees by its letter of Janu-

the finding that Sure-Tan thereby violated the National Labor Relations Act ("NLRA"), and in resisting the reinstatement and backpay remedy, petitioner contends primarily that the decision below conflicts with the policies of the Immigration and Nationality Act ("INA").³ We shall show, however: that insofar as is relevant to this case, the policies of the two statutes are entirely consistent with each other; that, on the facts of this case, the decision below is an entirely correct interpretation of the NLRA; and that reversal of the decision below would defeat the policy of the INA by encouraging employers to hire illegal aliens.

ary 20, 1977 to the INS which questioned their and other Mexican nationals' immigration status, see 672 F.2d at 599, is, as the Court of Appeals ruled, "specious," *id.* at 601. Sure-Tan's observation that "the return of the illegal aliens was 'proximately caused' by their own illegal status" is a palpable evasion of the real issue, which is whether Sure-Tan's "inquiry to the INS", which "facilitated the Service's performance of its statutory obligations" (Pet. Br. 14) was a *legal cause* of the severance of these individuals' employment. That question was correctly answered in the affirmative by the Board and the court below. To treat the actions of the INS as a superseding cause which excuses Sure-Tan from responsibility for the consequences of its letter to the INS, would be contrary to common sense and established legal principle:

Where the negligent conduct of the actor creates or increases the foreseeable risk of harm through the intervention of another force, and is a substantial factor in causing the harm, such intervention is not a superseding cause. [A.L.I. Restatement of Torts Second, § 442 A.]

Here, of course, the actor's conduct (writing the letter to INS) was not negligent but deliberate and the harm to the employees was precisely that which the actor intended, as the Company no longer disputes, see p. 12, *infra*. The fact that the INS' "actions were nondiscriminatory duties mandated by the federal immigration laws," Pet. Br. 14, rendered the occurrence of the risk created thereby "foreseeable", if not inevitable.

³ Petitioner's subordinate arguments, that its letter to the INS was privileged, Pet. Br. 16-19, and that the backpay remedy improperly rewards illegal aliens, *e.g.*, *id.* at 20-21, also depend on petitioner's misunderstanding of the immigration and labor laws, see pp. 18-21, and 24, *infra*.

B. It is a commonplace that a major purpose of the NLRA is to remedy the "inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employees" which "tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries." Declaration of Policy, § 1.

The restrictions on immigration in the INA are also designed to protect American workers. As this Court said in 1929:

The various acts of Congress since 1916 evince a progressive policy of restricting immigration. The history of this legislation points clearly to the conclusion that one of its great purposes was to protect American labor against the influx of foreign labor. [*Karnuth v. United States*, 279 U.S. 231, 243.]

Section 212(a) (14), 8 U.S.C. § 1182(a) (14)⁴ therefore

⁴ In its present version § 212(a) (14) provides:

(a) Except as otherwise provided in this chapter, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States:

* * * *

(14) Aliens seeking to enter the United States, for the purpose of performing skilled or unskilled labor, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that (A) there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of aliens who are members of the teaching profession or who have exceptional ability in the sciences or the arts), and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and (B) the employment of such aliens will not adversely affect the wages and working conditions of the workers in the United States similarly employed. The exclusion of aliens under this paragraph shall apply to preference immigrant aliens described in section

lists among the classes who shall be excluded from admission to the United States those who seek "to enter the United States for the purpose of performing skilled or unskilled labor" unless the Secretary of Labor determines and certifies to the Attorney General that the aliens will not compete with and that their employment will not adversely affect the wages and working conditions of workers in the United States similarly employed.⁵

203(a)(3) and (6), and to nonpreference immigrant aliens described in section 303(a)(8), * * *.

⁵ In its original version § 212(a)(14) came into the law as part of the major restructuring of the immigration laws by the Immigration and Nationality Act of 1952, 66 Stat. 183. The section then provided for the exclusion of aliens seeking to perform work in the United States if the Secretary of Labor certified that workers are available in the United States to perform that work or that the employment of such aliens would adversely affect the wages and working conditions of workers in the United States similarly employed. The 1965 Act (P.L. 89-236, 79 Stat. 917) amended this provision to exclude aliens seeking work in the United States unless the Secretary certified that there were *not* available workers and that the employment of the aliens would *not* adversely affect the wages and working conditions of workers in the United States similarly employed. See 1 Gordon & Rosenfield, *Immigration Law and Procedure*, § 240 a, pp. 2-288 to 2-291 (1983 ed.). The Senate Report on the 1965 amendment stated:

Simultaneous with the abolition of national quotas, controls to protect the American labor market from an influx of both skilled and unskilled foreign labor are strengthened. * * * [T]he provision of existing law * * * has the effect of excluding any intending immigrant within the scope of the certification who would likely displace a qualified American worker or whose employment in the United States would adversely affect the wages and working conditions of workers similarly employed in the United States. Under the instant bill, this procedure is substantially changed. The primary responsibility is placed upon the intending immigrant to obtain the Secretary of Labor's clearance prior to the issuance of a visa establishing (1) that there are not sufficient workers in the United States at the alien's destination who are able, willing, and qualified to perform the skilled or unskilled labor and (2) that the employment of the alien will not adversely affect wages and

In *DeCanas v. Bica*, 424 U.S. 351, this Court described the economic impact which the employment of illegal aliens has on the American workers with whom those aliens compete for jobs:

Employment of illegal aliens in times of high unemployment deprives citizens and legally admitted aliens of jobs; acceptance by illegal aliens of jobs on substandard terms as to wages and working conditions can seriously depress wage scales and working conditions of citizens and legally admitted aliens; and employment of illegal aliens under such conditions can diminish the effectiveness of labor unions. [424 U.S. at 356-357.]

The present immigration laws have, however, been notoriously unsuccessful in preventing the employment of aliens who do not qualify for admission under § 212(a) (14). In *Plyler v. Doe*, 457 U.S. 202, the Court observed:

Sheer incapability or lax enforcement of the laws barring entry into this country, coupled with the failure to establish an effective bar to the employment of undocumented aliens, has resulted in the creation of a substantial "shadow population" of illegal migrants—numbering in the millions—within our borders. [457 U.S. at 218.] *

working condition of U.S. citizens similarly employed. * * *
[S. Rep. 784, 89th Cong., 1st Sess., 15 (1965), emphasis added.]

The Courts of Appeals are divided as to whether the 1965 Act sets up a presumption that aliens may not enter the United States for permanent employment. Contrast *Pesikoff v. Secretary of Labor*, 501 F.2d 757, 761 (C.A. D.C.), *cert. den.*, 419 U.S. 1038, quoted with approval at Pet. Br. 23-24, n.14, and by Judge Wood in dissenting in *Sure-Tan I* (583 F.2d at 361-362) with *Production Tool v. Employment & Training Admin.*, 688 F.2d 1161, 1168-1170 (C.A. 7, Wood, J.) disapproving *Pesikoff*. Since both Courts of Appeals are agreed that § 212(a) (14) is designed to protect the American labor market, the conflict between them concerning the degree of protection provided need not be resolved herein.

* The Court noted the Attorney General's recent estimate that there are between 3 and 6 million illegal aliens within the United States. 457 U.S. at 218, n.17.

Employment opportunities in the United States are attractive to aliens because of the disparity between even the lowest-paying jobs in the United States and the wages available in their country of origin. For their part, unscrupulous employers have a strong economic incentive to seek out illegal aliens "as a source of cheap labor." *Id.* at 219.

It is clear from the foregoing that the policies of the National Labor Relations Act and the Immigration and Nationality Act are consistent and complementary insofar as they protect the labor standards of American workers.

It is likewise clear that nothing in the INA gives an employer the *right* to hire aliens who have not complied with the requirements of § 212(a)(14). "It is true", as the Court recognized in *De Canas, supra*, that "a proviso to 8 U.S.C. § 1324, making it a felony to harbor illegal entrants, provides that 'employment (including the usual and normal practices incident to employment) shall not be deemed to constitute harboring.'" 424 U.S. at 360. But *De Canas* squarely held that 8 U.S.C. § 1324 does not embody a federal policy which preempts a state law which makes it a crime to hire illegal aliens. See 424 U.S. at 360-361. Nor may the aforesaid proviso (or any other provision of the INA) be read to immunize conduct which violates the NLRA. The judicial duty is to give harmonious operation and effect to all statutory provisions if possible, absent some explicit indication of legislative intent derived from the words of the statute or its legislative history. See, e.g., *Watt v. Alaska*, 451 U.S. 259, 267; *Morton v. Mancari*, 417 U.S. 535, 549.

⁷ The Court noted that "construction of the proviso as not immunizing an employer who knowingly employs illegal aliens may be possible." 424 U.S. at 360, n.9. *Sure-Tan* understandably does not contend that although the Company knowingly employed illegal aliens—as was found below, see p. 12, *infra*—it thereby violated § 1324, or that the termination of their employment was designed to end a continued violation of that provision.

C. The foregoing discussion teaches two basic lessons. First, there is no inconsistency or conflict between the NLRA and the INA that requires the former to yield to the latter. Second, there is a strong public policy against the employment of aliens who have not satisfied the certification requirement of § 212(a)(14) of the INA. It is against this background that the paradoxical reliance by Sure-Tan—which employed illegal aliens contrary to the policy of the INA—on the INA as a defense to the charge that the Company's constructive discharge of those employees violates the NLRA must be evaluated.

Sure-Tan asserts that the decision below “results in penalizing Sure-Tan for reporting a suspected violation of law.” Pet. Br. 16. This argument depends on artificially isolating the action Sure-Tan took to cause the termination of the aliens' employment from the entire prior relationship and from its motive for the report.

If, when each of the aliens had applied for employment, Sure-Tan had sought to determine whether the applicants were lawfully in the country, and on learning that they were not had so informed the INS, the national immigration policy would have been served, and no question under the NLRA could have arisen. This would have been the proper course for Sure-Tan, as the Ninth Circuit observed in the sentence quoted at Pet. Br. 16: “An employer who suspects that an employee is in the United States without proper authority should report this information to the INS.”^{*} But that is not what Sure-Tan did. As the court below observed:

We are not so naive as to believe that Sure-Tan does not share some practical blame in this case for any alleged violation of the immigration laws. We find it difficult to believe that a metropolitan Chicago employer can employ a work force almost exclusively made of Spanish-speaking men of Mexican origin

^{*} *N.L.R.B. v. Apollo Tire Co., Inc.*, 604 F.2d 1180, 1183 (C.A. 9). We show at pp. 16 to 17, *infra* that this sentence is wrested out of context at p. 16 of Sure-Tan's brief.

at wages within pennies of the minimum wage (and at hard and unappetizing work) without even suspecting that some of these employees are illegal aliens. [672 F.2d at 601, n.14.]

Even if Sure-Tan did not know or suspect that the individual whom the Company was hiring were illegal aliens, the Board and the court below determined that Sure-Tan knew "several months *before* the [union representation] election that 'these men were illegally here.'"⁹ Sure-Tan's brief nowhere acknowledges—although it no longer disputes—that Sure-Tan knowingly continued to employ these illegal aliens for several months.¹⁰ Yet Sure-Tan did not inform the INS of the presence of the illegal aliens in its employ until the day after the Company was notified that the Board had certified the Union. The "stunning obviousness of the timing"¹¹ and the background of Sure-Tan's other unfair labor practices in the course of the Union's organization drive,¹² leave no doubt of Sure-Tan's anti-union animus in writing the INS, and thereby causing the alien employees' discharge.

⁹ 672 F.2d at 600, quoting from an affidavit of one of Sure-Tan's owners and operators, John Surak (Court of Appeals' emphasis).

¹⁰ In this connection the Court of Appeals "note[d] that the argument advanced by counsel on this appeal regarding the Surak brothers' knowledge of the illegal alien status of these employees borders on the ludicrous when considered in connection with the prior affidavits of fact procured by this same counsel." 672 F.2d at 600, n.12.

¹¹ *N.L.R.B. v. Rubin*, 424 F.2d 748, 750 (C.A. 2).

¹² As the Court of Appeals observed, the "record is replete with examples of Sure-Tan's blatantly illegal course of conduct to discourage its employees from supporting the Union." 672 F.2d at 601-602. Earlier in the opinion the Court had affirmed the Board's findings, not contested here, that the "Surak brothers threatened, coerced and interrogated their employees in violation of sections 8(a)(1), 8(a)(3) and 8(a)(4)." *Id.* at 602. See *id.* at 596-599, describing these unfair labor practices. The Court also noted, *id.* at 602, that in *Sure-Tan I* it had enforced the Board Order finding the employer guilty of violating § 8(a)(5) by refusing to bargain with the certified union.

Sure-Tan charges the Court of Appeals and the Board with holding "in effect, that once illegal alien workers engage in protected union activities, an employer may no longer inquire with the INS, even if it suspects that it might be employing illegal aliens." Pet. Br. 16. Of course, they have not so held "in effect" or otherwise. As we have emphasized, pp. 11 to 12, *supra*, Sure-Tan would not have violated the NLRA if the Company had written the INS when these Mexican nationals first applied for employment or at any time thereafter, provided that it did not do so for the purpose forbidden by § 8(a)(3) of the NLRA. The Court of Appeals' opinion makes entirely clear the narrow set of circumstances in which discharge by notification to the INS is illegal:

The close time relationships involved shed a clear light on Sure-Tan's motives. Sure-Tan sent the letter to the INS only one day after receiving the Regional Director's order overruling Sure-Tan's objections to the election and requiring Sure-Tan to bargain with the Union. *Sure-Tan's deathbed conversion to enthusiastic enforcement of the immigration laws, which of course, coincided with the Union's victory in the representation election, can hardly provide it with any defense under section 8(a)(3). In fact, in this case as probably in others the immigration laws have provided an employer with a powerful tool for unfair and oppressive treatment of migrant labor. The immigration laws have been conveniently employed to impose the ultimate penalty of discharge (and deportation or its equivalent) if migrant laborers should have the effrontery to join a union. As Chief Judge Cummings noted in our first Sure-Tan case, "it ill becomes the Company to argue after losing the election that certification would conflict with the immigration laws. 583 F.2d at 360. [672 F.2d at 602, emphasis supplied.]*

It is, of course, no purpose of the immigration laws to enable American employers to hire and exploit illegal aliens.

D. To be sure, Sure-Tan's letter to the INS, viewed in isolation, would further the policy of the immigration laws to the limited extent that the letter caused the removal of these five aliens who lacked the requisite documentation from the American work force. For Sure-Tan thereby put in motion machinery to discontinue its own flouting of the immigration policy.¹³ In broader perspective, however, Sure-Tan's course of conduct, including its culminating letter to the INS would, if permitted, seriously undermine the immigration policy. For such a permission would *encourage* employers to hire illegal aliens by creating a class of workers who would be terrified of exercising the organizational and representational rights declared in § 7 of the NLRA. This point was well made by Judge Cummings for the court below in *Sure-Tan I* in ruling that illegal aliens are "employees" for the purpose of § 2(3) of the NLRA and entitled to vote in representation elections:¹⁴

If a company can avoid certification merely by hiring aliens, undoubtedly some companies will choose to hire such aliens in order to gain immunity from labor unions. Cf. *Gates v. Rivers Construction Co.*, 515 P.2d 1020, 1022 (Alaska 1973). Thus by refusing to certify unions with a majority of alien members we would be giving employers an extra incentive to hire aliens and thus would be defeating the goals of the immigration laws.

The likelihood of this result may be illustrated even by the facts of this case, in which, according to the Regional Director's January 17, 1977, supplemental decisions (Board App. 10), John Surak, president of Sure-Tan, Inc., stated that several months

¹³ We note, however, that the record does not show whether Sure-Tan replaced these individuals with other illegal aliens, or with persons entitled to work, that is, American citizens or documented aliens.

¹⁴ Sure-Tan does not challenge these propositions in this Court.

before the election was held, he was told that the "employees were illegally present in the United States." While the Board chose not so to infer in this case, the obvious possibility is that a company would hire illegal aliens without informing the Immigration and Naturalization Service and without seeking certification of the aliens from the Secretary of Labor, as more responsible employers frequently do (see, e.g., *Stenographic Machines v. Regional Administrator*, 577 F.2d 521 (7th Cir. 1978), knowing that if the aliens successfully unionize they could then be reported to the Immigration and Naturalization Service and deported. It is not necessary to hold here that the employer is estopped from making this argument, but at the least it is clear that in view of this prior knowledge (and prior disregard of its alleged duty under the immigration laws), it ill becomes the Company to argue after losing the election that certification would conflict with the immigration laws [583 F.2d at 360, footnote omitted.]¹⁵

¹⁵ *Gates v. Rivers Construction Co., Inc.*, 515 P.2d 1020 (Sup. Ct. Alaska), which was cited in *Sure-Tan I*, held that an employer of an illegal alien could not refuse to pay the alien's salary. Justice Boochever (now a United States Circuit Judge), reasoned:

[S]ince the purpose of this section would appear to be the safeguarding of American labor from unwanted competition, the appellant's contract should be enforced because such an objective would not be furthered by permitting employers knowingly to employ excludable aliens and then, with impunity, to refuse to pay them for their services. Indeed, to so hold could well have the opposite effect from the one intended, by encouraging employers to enter into the very type of contracts sought to be prevented. [515 P.2d at 1022.]

The other reasons given by the *Gates* court for enforcing the employment contract are likewise pertinent here. First, that Court observed that the INA does not declare that labor contracts of illegal aliens are void, see 515 P.2d at 1021-1022; so, too, there is nothing in the INA which limits the scope of the protections or remedies provided by the NLRA. Second, the court considered it to be "contrary to general considerations of equity and fairness" to permit the employer "who knowingly participated in an illegal transaction * * * to profit thereby at the expense of the appellant," *id.* at 1022;

In *N.L.R.B. v. Apollo Tire Co., Inc.*, *supra*, a case on which *Sure-Tan* relies (Pet. Br. 16), the Ninth Circuit approved the reasoning of *Sure-Tan I*:

We agree with the *Sure Tan* majority that the Board's interpretation best furthers the policies underlying the immigration laws. Were we to hold the NLRA inapplicable to illegal aliens, employers would be encouraged to hire such persons in hopes of circumventing their labor laws. The result would be more work for illegal aliens and violations of the immigration laws would be encouraged.

Furthermore, we hesitate to require the Board to delve into immigration matters, out of its field of expertise. Questions concerning the status of an alien and the validity of his papers are matters properly before the Immigration and Naturalization Service. *An employer who suspects that an employee is in the United States without proper authority should report this information to the INS.* Our holding merely insures that an employer is not permitted to commit unfair labor practices in the knowledge that the Board is powerless to remedy them. [604 F.2d at 1183, emphasis added to show the sentence quoted at Pet. Br. 16.]

Thus, in the sentence on which *Sure-Tan* relies, the *Apollo Tire* court did not voice approval of employer notification to the INS of their employees' illegal status without regard to the circumstances. Rather, the Ninth Circuit declared that employers who suspected that an employee is an illegal alien should report this fact to the INS *rather than* committing unfair labor practices against the alien. The court did not confront a situation like the present case, where the employer knowingly em-

so here, acceptance of petitioner's position would permit it to injure employees because they had voted for the union, after *Sure-Tan* had benefited from their labor. See also *Nizamuddin v. Ben Cabaret*, 92 Misc. 2d 220, 222-223 (N.Y. Sup. Ct., Queens Cty.)

ployed illegal aliens, thereby enjoying the benefits of cheap labor, and reported them to the INS only to punish the employees for exercising their rights under the NLRA. And the thrust of the entire passage quoted herein, and of the court's holding, is that notification under such circumstances would not be lawful, because, under Sure-Tan's theory (as under a rule which excluded illegal aliens entirely from the protection of the NLRA) this would encourage employers "to hire such persons in hopes of circumventing the labor laws." 604 F.2d at 1183. For the sum and substance of Sure-Tan's position is that the Company should be "permitted to commit unfair labor practices"—that is, to injure illegal aliens because of their exercise of their rights under the NLRA—"in the knowledge that the Board is powerless to remedy them." *Id.* As the court below said when Sure-Tan made the same argument,

an employer has no right to rely on a "moral obligation" to report illegal aliens (of which he has been previously oblivious) merely to sanctify an otherwise unjustifiable violation of section 8(a) (3). * * *

A contrary holding would encourage employers to hire illegal aliens, who would for all practical purposes be stripped of NLRA protection and who could be fired with impunity at the first hint of union sympathy. [672 F.2d at 601, citation and footnote omitted.]

In an accompanying footnote the Court below pointedly observed:

There seems nothing like a successful union election to concentrate an employer's mind on the color of its workers' visas (if they exist) and on its moral obligations to expel its (once faithful) employees from the country. [672 F.2d at 601, n.14.] ¹⁶

¹⁶ Sure-Tan's invocation of the misprision of felony statute, 18 U.S.C. § 4, Pet. Br. 16, n.6, does not reflect favorably on the *bona fides* of its position. If Sure-Tan had believed that this stat-

E. Sure-Tan's claim of a constitutional right, Pet. Br. 16-19, stands on no firmer ground than its suggestion that the Company might have had a duty of disclosure. We do not question Sure-Tan's right "to petition the Government for a redress of grievances", but its letter to the INS did not constitute an exercise of that constitutional right. What was the "grievance" of which Sure-Tan sought redress? It was surely not that these five individuals were working in the United States contrary to the INA; Sure-Tan had been entirely satisfied to have these individuals as employees despite that law *until they voted for Union representation*. Rather, Sure-Tan doubtless felt aggrieved by that decision of its employees, and the Labor Board's resulting certification of the Union. But that is not a "grievance" in the constitutional sense.

The line of cases from *Eastern R. Conf. v. Noerr Motors*, 365 U.S. 127 through *Bill Johnson's Restaurants, Inc. v. NLRB*, — U.S. —, 51 L.W. 4636 (May 31, 1983) cited at Pet. Br. 17-18, does not support petitioner's novel invocation of the "redress of grievances" clause to immunize Sure-Tan's destruction of the employees' NLRA rights. In those cases the Court held (construing federal statutes in light of the First Amendment) that an illegal motive to injure others was an insufficient basis for forbidding a party from petitioning the appropriate public officials for the protection of that party's legitimate interests. For example, in the most recent of these cases, *Bill Johnson's Restaurants*, the employer, though motivated by a desire to discourage the exercise of NLRA rights, had asserted, in state court, an interest in its own reputation, protected by State law. See 51

ute might require the Company to notify the INS of the presence of illegal aliens, that should have been done so months previously, when it admittedly knew its employees' status, see p. 12 and nn.9 and 10, *supra*. 18 U.S.C. § 4 is plainly inapposite however, since it is not a crime for an undocumented alien to enter and work in the United States; the sanction provided by the INA is deportation. The term "illegal alien" is, in this respect, somewhat misleading.

L.W. at 4639. But while Sure-Tan was acting with the same illegal motive, unlike the employer in that case, the Company was not protecting any lawful interest of its own. The INA was not enacted for the protection of employers who have hired illegal aliens.

There is an additional significant difference between this case and *Bill Johnson's*. In the latter case, the Court did not treat the employer's right to access to the courts as an independently sufficient reason for reversing the Board's unfair labor practice finding. Rather, the Court relied also on "the States' compelling interest in the maintenance of a domestic peace", in recognition of which "the Court has construed the [NLRA] as not preempting the States from providing a civil remedy for conduct touching interests 'deeply rooted in local feeling and responsibility.'" 51 L.W. at 4639, quoting *San Diego Unions v. Garmon*, 359 U.S. 236, 244. Pointing to such precedents as *Linn v. Plant Guard Workers*, 383 U.S. 53 (holding that an employer can properly recover damages in a tort action arising out of labor dispute if it can prove malice and actual injury) and others in which a tort remedy was held not to be preempted by the NLRA, the Court concluded that the state interests identified therein would be undermined if it were held unlawful under the NLRA for an employer to prosecute a meritorious action even if he was improperly motivated. 51 L.W. at 4639. Whereas in *Bill Johnson's* there was conflict between the Board's unfair labor practice finding and state interests, there is no parallel conflict between the unfair labor practice finding against Sure-Tan and the policies of the INA. See pp. 7 to 13, *supra*. Rather, to excuse Sure-Tan's course of conduct would encourage employers to offer employment to—and thus attract to this country—aliens who may not lawfully enter for the purpose of seeking and holding jobs in this country. See pp. 14 to 17, *supra*. Thus, to hold that the INA grants employers a grievable interest and thereby provides them with a means for avoiding the obligations of the NLRA "would

indeed be to 'turn the blade inward'" Cf. *Graham v. Brotherhood of Firemen*, 338 U.S. 232, 237.

It bears emphasis in this connection that Judge Wood's concern that enforcement of the Board's Order would adversely affect American workers—a position that Sure-Tan, which employed illegal aliens rather than American workers, cynically adopts, Pet. Br. 15—is misdirected. There is far more at stake here than the question of whether the five Mexican nationals will lose some backpay, and the opportunity—if they obtain a Labor Department certification enabling them to return—to be reinstated at Sure-Tan. If Sure-Tan prevails in this case, American workers throughout the United States will be confronted by employers who will have an additional incentive to hire illegal aliens. These employers would be secure in their knowledge that such employees, in contrast with American citizens and aliens who have Labor Department certification, will not be protected by §§ 7 and 8(a)(3) of the NLRA. Such employees will be uniquely vulnerable to intimidation and discrimination to discourage union membership. An employer who hires a sufficient number of illegal aliens will be virtually unionproof, a condition to which many employers aspire, and which is especially valuable to those who pay substandard wages. It is to be remembered that it was an American union which organized Sure-Tan's employees and was certified as their representative. See 583 F.2d at 356, n.2. Given the reality that vast numbers of employers do hire illegal aliens, such unions have little choice but to attempt to organize those workers, and thereby to counteract, at least in part, the adverse economic effects which this Court identified in *DeCanas*, 424 U.S. at 356-357, quoted at p. 9, *supra*.¹⁷ Employers

¹⁷ Unions do not have the alternative of reporting illegal aliens to the INS. Unlike the employer, the union will ordinarily not even know the employees' identity, let alone whether they have a certificate from the Secretary of Labor. And it would be unprincipled for a union to solicit the aliens' interest and support and then to report them to the immigration authorities.

would have additional motivation to seek out illegal aliens if they knew that unions would not attempt to organize and represent them. Cf. pp. 14 to 17, *supra*. Moreover, if the union is successful in obtaining certification it has the opportunity, through collective bargaining, to improve these employees' wages and working conditions, thereby depriving the employer of his unfair economic advantage over competitors, the employers of American labor. That unions need to do just that is axiomatic. *American Steel Foundries v. Tri-City Trades Council*, 257 U.S. 184, 209. And it is that unfair advantage Sure-Tan has sought to achieve and retain by first flouting and then exploiting the immigration laws.

II.

A. Under the decision below, the five individuals who lost their jobs as a result of the employer's unfair labor practice are to be awarded backpay, subject to certain conditions, to compensate those individuals for the losses they suffered as a result of the employer's unlawful act. Any discriminatee who was "unavailab[le for work] because of enforced absence from the country will have [his] backpay tolled accordingly" during the period of his absence. 246 N.L.R.B. at 1788; *see also* 672 F.2d at 606. However, each discriminatee is to receive backpay for at least six months on the ground that "six months is a reasonable assumption" as to the "minimum [time] during which the discriminatees might reasonably have remained employed without apprehension by INS but for the employer's unfair labor practice." 672 F.2d at 606.¹⁸

¹⁸ The six-month backpay floor originally was proposed by the Court of Appeals as a step the Board could take, "if it sees fit." 672 F.2d at 606. Following that court's decision, the Board submitted to the court a proposed judgment order which, as the Board has stated in this Court, "was intended to grant the discriminatees the suggested minimum backpay award." Br. for the NLRB in Opposition at 8 n.8. (The Board's proposed order appears in Pet.

Sure-Tan here challenges this six-month "floor" for the backpay award, claiming that the award of backpay for any period of time during which a discriminatee is in Mexico is impermissible under the NLRA and the immigration laws. As we proceed to show, the company's challenge is without merit; the floor on the backpay award represents a logical application of well-established NLRA remedial principles to a *sui generis* factual situation, and nothing in its application conflicts with the immigration laws.

1. The General Counsel of the NLRB has developed a Casehandling Manual which, *inter alia*, sets forth the rules the Board has developed through its decisions for computing backpay. Section 10530.1(a) defines the "period covered" by a backpay award as follows:

The period covered is that from the discriminatory loss or refusal of employment to a bona fide offer or reinstatement, but it does not include any period * * * during which respondent proves the discriminatee was not available for work or has incurred a willful loss of earnings.

Sections 10612-10626 set forth in detail the rules for determining when a discriminatee should be deemed to have been "unavailabl[e] for work." The opening sentence of this part reaffirms the general principle: "When a discriminatee becomes unavailable gross backpay does not accrue until [the] discriminatee becomes available again. . . ." ¹⁹ But section 10612.1 sets forth an important caveat, grounded in the Board's decisions:

App. at 30a-33a.) The appellate court, however, was "uncertain" from the Board's proposed order "whether the Board has adopted th[e] suggestion," Pet. App. 28a; that court nonetheless mandated a six-month minimum backpay award because "in this admittedly unique case" such a minimum backpay award was required "if the policies of the NLRA are [to be] furthered," *id.*

¹⁹ The Board reaffirmed this rule in the instant case: "Discriminatees who are . . . found to be unavailable for work . . . will have their backpay tolled accordingly." 246 NLRB at 728.

In certain situations, unavailability through an injury suffered at interim employment, or an illness fairly attributable thereto, may not toll backpay. *Similar injuries resulting from unfair labor practices may not toll backpay.* [Emphasis added.]

Sure-Tan does not here challenge, as a general matter, the Board's rule that backpay is not tolled when a discriminatee's unavailability "result[s] from unfair labor practices." The decision below simply applies this settled rule to what the Seventh Court properly termed "this admittedly unique case." Pet. App. 28a. As that court recognized, the Company's unfair labor practice "was the proximate cause" of the discriminatees' departure from this country and hence of their unavailability for work here. 672 F.2d at 592. Had Sure-Tan not contacted INS, the discriminatees would have remained in this country (and would have been available for work) for an additional period of time until "independent detection of them by INS" would have resulted in their departure and hence their independent unavailability for work; six months was viewed as a "reasonable assumption" of the duration of that period. Thus, the award of backpay for this six-month period during which discriminatee's unavailability was the result of Sure-Tan's unfair labor practice merely implements the general rule that backpay liability is not tolled when unavailability is the employer's doing.

2. As the foregoing makes clear, petitioners are simply wrong in contending that the six-month floor on the backpay award here "is patently punitive." Pet. Br. at 27. The discriminatees suffered a real loss of wages as a result of petitioners' unlawful acts. The six-month floor on the backpay award is an integral part of the attempt by the Board and the court below to compensate these discriminatees for the earnings they would have received but for the employers' discrimination. The discriminatees are to be awarded only the actual amount of the wages they would have received from Sure-Tan for this six-month

period, less any interim earnings the discriminatees received during this period. This is the essence of a *compensatory* remedy.

Petitioner's contention that the six-month floor on the backpay award "creates an untenable conflict between the NLRA and the immigration laws," Pet. Br. at 24, is without substance. The decision below does *not* proceed on the assumption that the discriminatees "had a right to remain in this country," *id.*; backpay is awarded for a limited period during which, as a practical matter, the discriminatees would in reasonable probability have remained in this country and worked for Sure-Tan if the Company had not, in an effort to penalize union activity, contacted the INS. Significantly, except for this limited period, the decision below does *not* permit backpay to be awarded while the discriminatees were outside the United States. Nor does the decision below require reinstatement unless a discriminatee gains lawful reentry to this country. And nothing in the decision below would require Sure-Tan or any other employer to hire an illegal alien or preclude petitioners or any other employer from firing an alien *because of that individual's illegal status*. Thus, the "conflict" between the decision below and the immigration laws is wholly illusory.²⁰

B. The final question in the petition for certiorari pertains to the propriety of the form of the reinstatement remedy: "Whether the NLRA requires that an offer of reinstatement to illegal aliens be held open for four years, be delivered in Mexico in a manner allowing verification

²⁰ Petitioners' assertion that the decision below creates an inducement to the discriminatees to unlawfully reenter the United States is equally untenable. Nothing in that decision conditions the discriminatees entitlement to *backpay* on their reentry; the discriminatees can claim their backpay by mail (or by lawfully entering the United States for a single day). And the decision below expressly conditions reinstatement to the discriminatees' securing *lawful* reentry, thus removing any incentive for the discriminatees to return here illegally in order to regain their jobs.

of receipt, and be written in Spanish." This question involves a complex of detailed, practical rules the Board has evolved in the course of the day-to-day administration of the Act for determining whether there has been a sufficient offer of reinstatement to toll the remains of back pay. Cf. *Ford Motor Co. v. EEOC*, — U.S. —, 50 L.W. 4937, 4940-4941 (June 28, 1982). We do not believe that we can make a sufficient contribution with respect to these issues to warrant extending this brief *amicus curiae*. We do suggest, however, that because these issues—such as whether an offer of reinstatement should be sent by registered or regular mail—do not present any question of legal principle, decision thereon would require the Court to immerse itself in the minutiae of the administration of the NLRA. Accordingly, we respectfully suggest that it may be appropriate to dismiss the writ of certiorari as improvidently granted with respect to the fourth question. See, e.g., *Mishkin v. New York*, 383 U.S. 502, 513-14.

CONCLUSION

For the foregoing reasons the judgment of the Court of Appeals for the Seventh Circuit should be affirmed. With respect to Question 4 presented by the petition for certiorari, the writ of certiorari should be dismissed.

Respectfully submitted,

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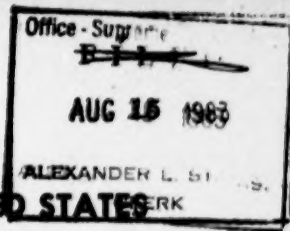
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AUG 15 1983



IN THE
SUPREME COURT of the UNITED STATES

OCTOBER TERM, 1982

No. 82-945

SURE-TAN, INC., AND SURAK LEATHER
COMPANY,

Petitioners,

versus

NATIONAL LABOR RELATIONS BOARD,

Respondent.

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

AND

AMICUS CURIAE BRIEF OF
CALIFORNIA AGRICULTURAL LABOR RELATIONS BOARD
IN SUPPORT OF RESPONDENT

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The California Agricultural Labor Relations Board respectfully moves this Court for leave to file the accompanying brief in this case as *amicus curiae*. The consent of respondent National Labor Relations Board has been obtained, but Petitioners Sure-Tan Inc. and Surak Leather Company refused to consent to the filing of a brief by the California Agricultural Labor Relations Board as *amicus curiae*.

STATEMENT OF INTEREST

The California Agricultural Labor Relations Board (ALRB) is an independent State agency which was created in 1975 to administer a newly-enacted statute governing relations between agricultural employees, labor unions, and agricultural employers in the State of California. This statute, the Agricultural Labor Relations Act (ALRA or Act),¹ came into being at a time when agricultural labor disputes had created unstable and potentially violent conditions in the State and were a threat to California's agricultural economy.

The purpose and object of the ALRA is to ensure peace in the fields by guaranteeing justice for all agricultural workers and stability in agricultural labor relations. The Act seeks to achieve these ends by providing orderly processes for protecting, implementing, and enforcing the respective rights and responsibilities of employees, employers, and labor organizations in their relations with one another. The overall job of the ALRB

¹ The ALRA is found at California Labor Code sections 1140 et seq.

is to achieve this goal through administration, interpretation, and enforcement of the ALRA. The Act is modeled after the National Labor Relations Act (NLRA), 29 U.S.C. sec. 151 et seq., and the Legislature directed the ALRB to follow applicable NLRA precedent in administering the ALRA.²

Like its NLRB counterpart, Amicus ALRB has two principal functions: (1) to determine and implement the free democratic choice of employees as to whether they wish to be represented by a union in dealing with their employers and, if so, by which union; and (2) to prevent and remedy unlawful acts and conduct, i.e., unfair labor practices, by either employers or unions.

In the course of its eight-year history, Amicus has often confronted the task of remedying unfair labor practices affecting undocumented workers.³ Although precise statistics are not available, it is undisputed that undocumented workers make up a significant proportion of the California agricultural workforce.⁴ This

² See California Labor Code section 1148. Section 2(3) of the National Labor Relations Act (29 U.S.C. sec. 151, et seq.) specifically excludes farmworkers from its coverage.

³ Although Petitioners and the Court below used the term "illegal aliens" to describe the discriminatees herein, Amicus prefers to refer to the discriminatees, as well as other similarly situated workers, as "undocumented workers", a term which accurately describes their situation and conforms to a United Nations resolution, joined by the United States, which directed the Secretary General to define those workers who illegally or surreptitiously enter another country to obtain work as "nondocumented migratory workers". (Salinas and Torres, *The Undocumented Mexican Alien: A Legal, Social, and Economic Analysis*, (1976) 13 Houston L. Rev. 863, fn. 1.) Amicus has employed the term "undocumented workers" in its own decisions. (E.g., *Mini Ranches Farms*, 7 ALRB No. 48 (1981).)

⁴ Recent studies indicate that the workforce available to cultivate and harvest California's fruit and vegetable crops is increasingly comprised of undocumented workers. Some crops depend al-

is particularly true in the southern part of the State, which borders on Mexico. Amicus has also had direct experience with the difficult and exploitative conditions under which undocumented agricultural workers live in California. Amicus accordingly believes that it may be of assistance to this Court.

Additionally, Amicus has a two-fold interest in this proceeding. First, since the ALRB is required by statute to follow applicable NLRA precedent, the Court's decision in the instant proceeding may directly affect Amicus's ability to effectively enforce the ALRA. Additionally, Amicus wishes to point out that California may have an independent State interest in continuing to include undocumented workers within the reach of the ALRA in view of (1) the exclusion of agricultural workers from the protections of the NLRA; (2) the California Legislature's desire to extend similar protections to California agricultural workers; and (3) the large number of undocumented workers employed in California agriculture. Thus, even if it were to be determined that either the Court-ordered remedies or the NLRB's remedies in this case impermissibly conflict with the policies of the Immigration and Nationality Act (INA), 8 U.S.C. sec. 1101 et seq., such a determination need not be so expan-

most entirely on a flow of undocumented workers from Mexico. For example, in San Diego County, the 5,000 laborers in the pole tomato crop are nearly all undocumented; in the Monterey County strawberry crop, 80% of the 1,500 workers are undocumented; and in Tulare County, 60% of the 7,000 citrus workers are undocumented. (Mines and Martin, *Foreign Workers in Selected California Crops*, California Agriculture, March-April 1983.)

sive as to limit California's right to regulate employment relationships to protect undocumented agricultural workers within the State.

The issues raised by this case are not only important to the particular federal agencies involved, the Court's decision herein will have far-reaching implications for California and other States struggling to cope with the effects of a large undocumented population.

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This brief *amicus curiae* is filed contingent on the granting of the foregoing motion for leave to file said brief. The interest of the Agricultural Labor Relations Board is set forth in that motion.

SUMMARY OF ARGUMENT

1. Petitioners' claimed conflict between the Immigration and Nationality Act (INA), 8 U.S.C. sec. 1101 et seq.) and the National Labor Relations Act (NLRA), 29 U.S.C. sec. 151 et seq., is based on a faulty premise, namely, that the only objective of Congress in enacting the INA was to protect American workers from an influx of foreign labor. The cases cited by Petitioners in support of that proposition involve the interpretation of section 212(a)(14) of the INA, (8 U.S.C. sec. 1182(a)(14)), which provides for the labor certification process. The INA serves a broader function; the statute is, in fact, a comprehensive scheme for regulating immigration and naturalization. Once that is recognized, it is apparent that there is no conflict between the overall policies and purposes of the INA and those of the NLRA. Moreover, petitioners have failed to demonstrate that even those sections of the INA enacted by Congress to protect the domestic workforce conflict with the standard NLRA remedies, the purpose of which is also to protect American workers.

2. Extension of the protections of the NLRA to undocumented workers serves to protect the domestic workforce as well as undocumented workers themselves. Thus, protected, undocumented workers are free

to organize, either among themselves or with their "legal" co-workers, to improve wages and working conditions. Without those protections, undocumented workers—who often accept jobs on substandard terms—will be unable to even attempt to improve their working conditions through concerted action, a situation which will "seriously depress wage scales and working conditions of citizens and legally admitted aliens." (*De Canas v. Bica* 424 U.S. 351, 357, (1976).)

3. Petitioners' action in reporting its employees to the Immigration and Naturalization Service (INS) was not protected by the First Amendment right to petition the government for redress of grievances. Petitioners' conduct falls within the "sham" exception recognized by this Court in *Bill Johnson's Restaurants Inc. v. N.L.R.B.*, — U.S. —, 103 S.Ct. 2161 (May 31, 1983) since their efforts to influence governmental action were neither genuine nor *bona fide*.

ARGUMENT

I

NLRB REINSTATEMENT AND BACKPAY ORDERS DO NOT CONFLICT WITH THE POLICIES OF THE INA; FURTHERMORE, UNFAIR LABOR PRACTICES AFFECTING UNDOCUMENTED WORKERS MUST BE FULLY REMEDIED IF NATIONAL LABOR POLICIES ARE TO BE EFFECTIVELY ENFORCED.

A. Petitioners Have Misidentified the Purposes of the INA, and Ignore The Policies and Purposes of The NLRA.

Petitioners Sure-Tan, Inc. and Surak Leather Company (Employer or Company) contend that the judgment and order of the Court of Appeals for the Seventh Circuit create a fundamental conflict between the NLRA and the INA. (Pet. 9.); Petitioners further suggest that even NLRB remedies which might provide for other, more limited relief for undocumented workers would also conflict with the INA.¹ (Pet. 12-13.) These arguments rest in part on the mistaken assertion that the only objective of Congress in enacting the INA was to protect American workers from an influx of foreign labor.

However, the cases cited by Petitioners in support of such a narrow interpretation all deal solely with various aspects of the process for *labor certification* under section 212(a) (14) of the INA.² (See, *Peskikoff v. Secretary of Labor*, 501 F.2d 757 (D.C. Cir. 1974) [Appeal from denial of labor certification for live-in maid]; *Wang v. Immigration & Naturalization Service*, 602 F.2d 211 (9th Cir. 1979) [Appeal from denial of exemption from labor certification requirements]; *Stenographic Mach. v. Re-*

¹ In this instance, as is customary, the NLRB deferred determination of the extent of Petitioners' backpay liability to subsequent compliance proceedings. (Pet. App. 63a; see, e.g., *N.L.R.B. v. Deena Artware* 361 U.S. 398 (1960).) The Court of Appeals determined, however, that the discriminatees were entitled to a minimum award of six months' backpay. Like the NLRB, Amicus ALRB routinely orders reinstatement and backpay as a remedy for discriminatory discharges without regard to the immigration status of the discriminatee.

² This section permits entry of foreign workers if the Secretary of Labor certifies both that there are no available, qualified domestic workers and that domestic wage rates will not be adversely affected thereby.

gional Admin'r Etc., 577 F.2d 521 (7th Cir. 1978) [Appeal from denial of applications for labor certification]; *Silva v. Secretary of Labor*, 518 F.2d 301 (1st Cir. 1975) [Appeal from denial of labor certification for live-in maid]; *Williams v. Usery*, 531 F.2d 305 (5th Cir. 1976) [Challenge to Secretary of Labor's failure to determine adverse effect of wage rate for imported sugar cane cutters].) While the purpose of that particular section is the protection of United States workers—both citizens and resident aliens—it does not necessarily follow that the primary purpose of the entire INA is to protect the domestic workforce from competition from foreign workers. For example, the INA does not make it a crime to hire undocumented workers—a proposal which has been urged as the most effective means of reducing employment of undocumented workers³. Nor do undocumented workers commit any crime by accepting employment. (*N.L.R.B. v. Sure-Tan*, 583 F.2d 355, 359 (7th Cir. 1978).) Congress did not enact the INA solely for the limited purpose of protecting the American workforce; rather, the INA provides a comprehensive scheme for the regulation of immigration and naturalization. (*De Canas, v. Bica, supra*, 424 U.S. 351, 359.)

Section 212(a) (14) of the INA, which provides for a labor certification process, offers one method, among several, for qualifying to enter into the United States;

³ See e.g., Martin and Mines, *Immigration Reform and California Agriculture*, California Agriculture, January-February 1983, p. 14; Fogel, *Economic Aspects of Illegal Aliens*, (1977) 15 San Diego Law Review 63, 76-78.

under this section, entry is conditioned upon the petitioner's job skills and a corresponding lack of skills among available domestic workers. In contrast, other preference categories focus on familial relationships. (See e.g., 8 U.S.C. sec. 1143(a) (1), (2), (4), (5). The labor certification process presents a Congressional accommodation between the interests of employers and the interests of American workers. (*Peskikoff v. Secretary of Labor*, *supra*, 501 F.2d 757, 761.) It does not, however, represent an articulation of the overall Congressional purpose in enacting the INA. Indeed, this Court expressly recognized in *De Canas v. Bica*, *supra*, that the "central concern of the INA is with the terms and conditions of admission to the country and the subsequent treatment of aliens lawfully in the country. (424 U.S. at 359)." ⁴

⁴ In *De Canas*, the Court refused to invalidate a California statute regulating employment of undocumented workers on the ground that the State statute was preempted by the INA. The Court characterized the statute's impact on immigration as "purely speculative and indirect" (424 U.S. at 355), and recognized that the States have an interest in regulating the employment relationship to protect workers within their boundaries.

The *De Canas* Court also recognized that the problem posed by large numbers of undocumented workers is particularly acute in California due to its proximity to Mexico. In determining that the INA had not preempted State action regulating the employment of undocumented workers, the Court looked to provisions of the Federal Farm Labor Contractor Registration Act (FFLCRA), 7 U.S.C. sec. 2041 *et seq.*, which specifically prohibit employment of undocumented workers by farm labor contractors. Those provisions of FFLCRA state that the Act intended to *supplement* State action in regulating undocumented workers. Both the exclusion of farmworkers from the NLRA, and this Court's interpretation of the FFLCRA in *De Canas*, suggest that California may retain the authority to include undocumented workers within the protections of the ALRA, including the authority to provide reinstatement and backpay for undocumented workers, notwithstanding any possible limitations on the NLRB's power to do so.

Once the INA is properly recognized as a comprehensive statutory scheme for regulating *immigration*, rather than one for regulating *employment* or *employment relations*, it is apparent that Petitioners' argument must fail. The NLRB does not seek to regulate either entry by, or naturalization of, undocumented workers; by ordering reinstatement and backpay for workers discriminatorily discharged due to their union activities, the national Board is enforcing national *labor* policies, the thrust of which are not at odds with policies underlying the nation's immigration laws.

Those labor policies are embodied in section 7 of the NLRA (29 U.S.C. sec. 157), which guarantees workers the right to self-organization; to form, join, or assist labor unions, to bargain collectively; and to engage in concerted activities for their mutual aid and protection.⁵ When the Sure-Tan workers exercised the rights guaranteed them by section 7, and selected a union to represent them, the Company deliberately contrived their discharge by requesting an INS check on their status. The NLRB's response was predictable—having found the workers' discharge was precipitated by their union activity, the Board ordered the Company to restore the workers to their former positions and make them whole for the economic losses caused by the unlawful discharges.

This Court recognized the importance of reinstatement as a remedy for unlawful discharges in *Phelps*

⁵ California Labor Code section 1152 corresponds to section 7 of the NLRA.

Dodge Corp. v. N.L.R.B., 313 U.S. 177, 193-194 (1941), where reinstatement was described as, "the effective assurance of the right of self-organization." In attacking the NLRB's order herein, Petitioners seek to render the NLRB powerless to remedy by reinstatement conduct which Employer concedes was motivated by anti-union animus. Although Petitioners specifically challenge only the backpay and reinstatement order, their analysis, carried to its logical conclusion, would preclude *any* Board remedy for the unlawful conduct. Such a result would not be consistent with the intention of Congress, nor with the goal of stable labor relations underlying the NLRA.

Employer concedes that, in notifying the INS, it was motivated by anti-union animus. The NLRB concluded that, having initially benefited from the employment of undocumented workers, Employer could not then cause their deportation in order to rid itself of a pro-union workforce. To condone Petitioners' conduct would distort the purpose of the federal immigration laws, and effectively prevent the NLRB from remedying the effects of unlawful discharges in any industry where undocumented workers are employed. The NLRA, like the INA, embodies policies of national scope and importance. Acknowledgement of the importance of those national labor law policies presents no conflict; each may be accommodated by the other. As discussed *infra*, the Board's remedies in this case serve to effectuate both national labor law *and* immigration policies.

NLRB (and ALRB) decisions which provide for rein-

statement and backpay for wrongfully discharged undocumented workers simply reflect the real world, i.e., the presence in the workforce of a significant number of undocumented workers, usually concentrated in low-paid, marginal occupations.⁶ Both the national Board and Amicus are confronted, not with the issue of whether the entry of these workers was legal, but with the question of how to remedy unlawful labor practices, once they have been committed, in order to effectuate the policies embodied in their respective Acts.⁷ In addressing that question, the NLRB has concluded that the affected workers' immigration status is not determinative of their rights. This is a function of the Board's responsibility for shaping and enforcing labor relations policies; the Board simply does not bear the responsibility for implementing national immigration policy or for

⁶ See, Gomez-Quinones, "Mexican Immigration to the United States and the Internationalization of Labor, 1848-1980: An Overview", Rios-Bustamante (ed.), *Mexican Immigrant Workers in the United States* (UCLA, 1981). The number of undocumented workers in the United States is estimated at between two and five million. Estimates vary considerably, as do the various methodologies for estimating. (See Cross and Sandos, *Across the Border: Rural Development in Mexico and Recent Migration to the United States* (U.Cal. 1981), pp. 81-84, summarizing various studies.)

⁷ This Court explicitly recognized that, although "a person's initial entry into a State, or into the United States, was unlawful, and that he may for that reason be expelled, [this] cannot negate the simple fact of his presence within the State's territorial perimeter. . . . And until he leaves the jurisdiction . . . he is entitled to the equal protection of the laws a State may choose to establish." (*Plyler v. Doe*, ____ U.S. ____, 102 S.Ct. 2382, 2394 (1982).) Under the Court's analysis in *Plyler v. Doe*, California may be required to provide the same protections to undocumented workers that it provides to all other workers under the ALRA.

acting directly to halt the flow of undocumented workers into the United States. The same is true for Amicus ALRB. Neither Board has the authority or expertise to enforce a statute administered by another agency. (*N.L.R.B. v. Apollo Tire Co. Inc.*, 604 F.2d 1180, 1183 (9th Cir. 1979); *Sure-Tan, Inc.* 246 NLRB 788 (1979) Order Denying Motion, Pet. App. 42a) The expertise of both the NLRB and Amicus ALRB lies in the area of labor relations; in this case, the NLRB utilized that expertise to effectuate the purposes of the NLRA. As demonstrated below, the NLRB's remedy in fact *accommodates* national immigration policies.

Were the Board to permit discriminatory discharges of undocumented workers, while prohibiting such treatment of other workers, the Board would actually *encourage* employment of undocumented workers as a means of defeating unionization. By redressing the commission of unfair labor practices without regard to the discriminatees' immigration status, the NLRB is, therefore, furthering the policies of section 212(a) (14) of the INA. (*N.L.R.B. v. Apollo Tire, supra*, 604 F.2d 1180, 1183; *N.L.R.B. v. Sure-Tan, Inc., supra*, 583 F.2d 355, 359.) ^a

^a In a somewhat analogous situation, this Court upheld a Maryland statute which (1) prohibited producers of petroleum products from operating retail service stations within the State, and (2) required such producers to extend voluntary allowances to all service stations they supplied, despite the statute's anticompetitive effect. (*Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978).) The Court held that, although the statute conflicted with the central policy of the Sherman Act—favoring free competition—the statute was not preempted. In part, the Court's decision rested on its conclusion that a contrary result would effectively destroy the State's power to engage in economic regulation. In the instant case, even assuming, arguendo, that NLRB decisions to extend protections to undocumented workers conflict with INA regulation of the employment of aliens, a con-

Although Petitioners contend that an order of reinstatement and backpay will encourage undocumented workers to enter the United States to claim their rights, any effect that NLRB (or ALRB) remedies might have on immigration is, in the words of the *De Canas* Court, "purely speculative and indirect." The Seventh Circuit pointed out that, as a practical matter, it was "unlikely that a discriminatee would attempt to illegally enter the United States primarily to pursue his remedies and thus draw attention to his illegal alien status." (Pet. App. 18a.) The court correctly identified the more likely causes of migration from Mexico as being the economic and social attractions of the United States. Those attractions, together with the chronic unemployment, food shortages, and overpopulation in Mexico, draw the Mexican undocumented worker to the United States⁹. NLRB and ALRB remedies can be only an insignificant factor in the push-pull of complex economic factors—both in the United States and Mexico—which cause and contribute to migration to this country.

In *Southern S.S. Co. v. N.L.R.B.*, 316 U.S. 31, 47 (1941)—the principal case upon which the Company relies—this Court cautioned that the "entire scope of Congressional purposes calls for careful accommodation of one statutory scheme to another. . . ." ¹⁰

trary conclusion would severely hamper the effectiveness of the agency in enforcing its own statute. The same would be true, *a fortiori*, for Amicus ALRB.

⁹ Salinas and Torres, *The Undocumented Mexican Alien: A Legal, Social, and Economic Analysis*, (1976) 13 Houston L. Rev. 863, pp. 808-809, and Cross and Sandos, *op. cit.* pp. 1-74.

¹⁰ This case, unlike *Southern S.S. Co. v. N.L.R.B.*, *supra*, 316 U.S. 31, presents no direct conflict between the NLRB's remedy and another clearly articulated Congressional proscription. In *South-*

Petitioners, however, would utterly disregard the national labor policies embodied in the NLRA, and instead focus on the policy considerations underlying but one aspect of the INA, the labor certification process. What Employer urges is not an accommodation of the NLRA and the INA, but a wholesale disregard of Congressional purposes and policies in enacting the NLRA. But, even the labor certification process, as well as other provisions of the INA designed to protect the American workforce, must accommodate national labor policies, because denial of the protections of the National Labor Relations Act to undocumented workers detrimentally affects the entire workforce.

B. Denial of NLRA Protections to Undocumented Workers Would Harm The Entire Workforce.

The NLRB has long recognized that undocumented workers are entitled to the protections of the NLRA.¹¹ (See, e.g., *Cities Service Oil Co. of Pennsylvania*, 87 NLRB 324, 331 (1949); *Morris Seedmon, et al.*, 102 NLRB

ern Steamship, strikers were discharged for engaging in concerted activity protected by section 7 of the NLRA; however, their conduct was a clear violation of the anti-mutiny provision of the federal maritime statutes. The Court found that the NLRB's remedial order was therefore unenforceable. The NLRB's remedy herein does not raise any direct conflict with the provisions of the INA, since it is not a crime for an employer to employ an undocumented worker or for an undocumented worker to work.

¹¹ Petitioners' contention that the employees' illegal status *ipso facto* excludes them from the protections of the NLRA would seem to be answered by the fact that Congress has been very specific when it elects to exclude undocumented persons from coverage under federal acts. (See, e.g., 7 U.S.C. sec. 2015(f) and 7 C.F.R. sec. 273.4 (1982); 45 C.F.R. sec. 233.50 (1982); 42 U.S.C. sec. 1395(i)-2 and 42 C.F.R. sec. 405.203(b) (1982).) No such exclusion is found in the NLRA.

1492 (1953).) The only federal courts to have expressly considered the issue have agreed with the NLRB's conclusion. (*N.L.R.B. v. Sure-Tan, Inc.*, 583 F.2d 355 (7th Cir. 1978); *Apollo Tire Co. v. N.L.R.B.*, 604 F.2d 1180 (9th Cir. 1979).) The Ninth Circuit pointed out that Section 2(3) of the NLRA defines "employees" broadly, and provides specific exceptions to coverage of the Act, which exceptions do not include undocumented workers. (*N.L.R.B. v. Apollo Tire, supra*, 604 F.2d 1180, 1182.)

As both the Seventh and Ninth Circuits recognized, extension of the protections embodied in the NLRA to undocumented workers serves to protect the domestic workforce as well as the undocumented workers themselves. This Court noted in *De Canas v. Bica, supra*, 424 U.S. 351, 357, that "acceptance by illegal aliens of jobs on substandard terms as to wages and working conditions can seriously depress wage scales and working conditions of citizens and legally admitted aliens."¹² By protecting undocumented workers who organize—either among themselves or with their "legal" co-workers—to improve wages and working conditions, the NLRB pro-

¹² See also, Salinas and Torres, op. cit., pp. 876-881, Cross and Sandos, op. cit. pp. 84-96, and Fogel, op. cit., p. 66. The Salinas-Torres article points out that native workers often must accept low wages and substandard working conditions for fear of being replaced by undocumented workers, and that this is especially true along the Mexican border, where the proportion of undocumented workers is so high that the wages paid to them become the prevailing wage, adversely affecting the standard of living of the community at large. The authors note that the Texas cities of Brownsville, McAllen, and Laredo—all bordering Mexico—had, at the time their article was written, the lowest per capita income in the nation.

fects all workers. Were it to exclude undocumented workers from the protection of the NLRA, the Board would actually *encourage* employment of undocumented workers by those employers who wish to avoid dealing with a union. Excluding undocumented workers from the protections of federal (and State) labor laws would additionally encourage employer exploitation of these workers. The court below recognized that the "immigration laws have provided an employer with a powerful tool for unfair and oppressive treatment of migrant labor." (Pet. app. 15a.) Undocumented workers are so pressured to find employment that they will usually work long hours for less pay than their "legal" counterparts. Their fear of being deported and of losing their only source of income requires uncritical acceptance of employer demands.

Amicus ALRB observed in its own decision, *Giumarra Vineyards*, 7 ALRB No. 24, p. 36 (1981) that "undocumented workers are more susceptible to intimidation and coercion than other agricultural employees. Their peculiar vulnerability is easily exploitable . . ." Reference to just a few ALRB decisions attests to the truth of that observation, and illustrates the desperate conditions endured by undocumented agricultural workers in California.

In *Ukegawa Brothers*, 8 ALRB No. 90 (1982), the Administrative Law Judge (ALJ) found that the employer relied heavily on undocumented workers living in the brush surrounding the employer's cultivated fields. The ALJ conducted an on-site inspection of the employer's

operation, and described the living conditions she observed:

. . . crude habitations were observed concealed in brush near the fields. Not tall enough to stand in, the structures consisted of pieces of cardboard and plastic strung in the brush, sometimes over rough wooden supports. Wood pallets and tomato boxes served as tables, seats, and beds. Were it not for the presence of firepits, trash in large quantities, and personal items such as clothing and pots, it would be difficult to believe these structures served as dwellings. Two stall showers were at one location, and at another site a man covered with lather was standing under a trickle of water from a drainage pipe. A catering truck (which the Employer permits to enter its fields) was observed stocked with toothpaste, razor blades and candles, as well as canned food items.

(8 ALRB No. 90, ALJ Decision, p. 8.)

The same sort of conditions prevailed among the workforce of Kawano, Inc., another San Diego County employer. In an ALRB proceeding involving that employer, a union organizer testified that at least some of the undocumented workers lived in the areas adjacent to Kawano's fields. He saw plastic lean-tos, pots, pans, and a makeshift fireplace; clothes were hanging out to dry. A catering truck entered the area after work hours, as did other vendors providing a variety of goods for the undocumented workers, who hesitated to leave the employer's isolated ranches for fear of detection. (*Kawano, Inc.*, 7 ALRB No. 16, ALJ Decision, pp. 57-58 (1981).)

Undocumented workers employed by Nagata Brothers Farms, also located in San Diego County, lived in

boxes and plastic tents, in the rows between the tomato vines, tents, or in caves at the edges of the fields. (*Nagata Brothers Farms*, 5 ALRB No. 39 ALJ Decision, pp. 7-9 (1979).)

In *Mini Ranch Farms*, 7 ALRB No. 48 (1981), the ALJ described the employer's treatment of its workforce, which was composed primarily of undocumented workers, in this way: The employees began work in late February and mid-March 1980. They were not paid any wages until April 7; between that date and May 9, they were paid \$4,982.00, which was divided among 25 workers. During all this time, the workers were working seven days a week, eight to ten hours a day. The employer also provided food and lodging, although the money for food was deducted from their pay. At one point, the employer gave the workers \$730.00 out of wages totaling \$2995.89, telling them the balance had been paid to a local market for food. When employees protested about non-payment of wages, they were told to return to Mexico if they did not "like it". The employer directly discharged 11 workers who had protested working conditions; he told them police were in the area and that they would have to return to Mexico. He drove them to an almond grove, and left them to make their way to the border as best they could. (*Id.* at pp. 3-6.)

Amicus has found that wages—as well as working and living conditions—of all agricultural workers are affected by the presence of undocumented workers. Undocumented workers are frequently paid less than "legals." For example, Ukegawa Brothers paid their undocu-

mented workers from \$.25 to \$.90 an hour less than documented workers. (*Ukegawa Brothers, supra*, 8 ALRB No. 9, ALJ Decision, p. 8.) Kawano, Inc. also paid its undocumented workers \$.40 an hour less than its documented workers (*Kawano, Inc.*, 4 ALRB No. 104 (1978), ALJD, p. 52 enf'd. *Kawano, Inc. v. Agricultural Labor Relations Bd.* 106 Cal.App.3d 937 (1980).) Extensive use of undocumented workers at these lower wage rates produces depressed area wage scales. (See *ante*, footnote 11.)

These examples illustrate the working and living conditions that undocumented workers are willing to accept. And, agricultural employers have demonstrated a corresponding willingness to utilize—and exploit—undocumented workers. California agricultural employers already employ significant numbers of undocumented workers; indeed, in some crops, the workforce is composed almost entirely of undocumented workers. (See Statement of Interest, p. 3, in accompanying Motion for Leave to File Amicus Curiae Brief.) The availability of this large pool of cheap labor has not only directly affected wages and working conditions of "legal" California farmworkers, it has also reduced job opportunities for the domestic workforce. For example, in 1976, Kawano hired 426 undocumented agricultural workers and only 25 "legal" workers; this reversed an earlier trend when Kawano hired a balanced ratio from the two groups. The change in hiring practices occurred after the passage of the ALRA, when the United Farm Workers of America, AFL-CIO, began to steadily gain support among the

Kawano workforce. To forestall union organization, the employer switched to a workforce composed almost entirely of undocumented workers. (*Kawano, Inc., supra*, 4 ALRB No. 104, pp. 10-11; see also *Ukegawa Brothers, supra*, 8 ALRB No. 90, ALJ Decision, pp. 146-151.)

This Court recognized in *De Canas* that employment of undocumented workers under depressed wage scales and working conditions can diminish the effectiveness of labor unions. (*De Canas v. Bica, supra*, 424 U.S. 351, 357.)¹³ This situation would be exacerbated if Employer's position herein were adopted—undocumented workers would be even more reluctant to engage in concerted action or union activities once deprived of the protections of the NLRA. Depriving even a portion of the workforce of those protections would be ill-advised since most legislation designed to protect the workforce and insure worker health and safety is not self-enforcing, and thus, an organized workforce may be the most effective means of enforcing such legislation.¹⁴ Therefore, the unrestrained exploitation of undocumented workers can only serve to weaken labor standards for the entire workforce. The NLRA and the ALRA, which permit all workers to organize for their mutual aid and protection—regardless of their immigration status—are thus critical in this scheme. Extension of the protections of the NLRA to undocumented workers who seek to organize to improve their wages and working conditions will rebound not only to their benefit, but to the benefit of the entire workforce.

¹³ See also, Fogel, op. cit. p. 66.

¹⁴ Ibid.

PETITIONERS' CONDUCT IN CONTACTING THE INS IS NOT
PROTECTED BY THE FIRST AMENDMENT TO THE
UNITED STATES CONSTITUTION

Employer contends that the NLRB and the Court of Appeals have, in effect, held that, once undocumented workers engage in protected union activities, an employer may no longer contact the INS if he suspects that he may be employing undocumented workers. From this premise, petitioners argue that the Board and the court below impermissibly restricted petitioners' First Amendment right to petition the government. Both premise and conclusion conveniently ignore the facts of this case.

Neither the Board nor the Court of Appeal has held that undocumented workers are immunized from discharge—or from an employer's notification of INS—by virtue of having engaged in protected activity. Instead, the Board found that an employer could not knowingly employ undocumented workers (and, presumably take advantage of their immigration status in setting the terms and conditions of employment), and then report those same workers to the INS when they unionize. In this case, the record establishes that Petitioners knew of their employees' immigration status months before the representation election, but chose not to report them to the INS until the day after the NLRB's regional director informed the company that he had certified the union.

(Pet.App. 68a-69a, 72a, n. 3.) The NLRB and the Court of Appeals concluded that, under these circumstances, Employers' conduct—admittedly retaliatory in motivation—amounted to a constructive discharge, in violation of section 8(a) (3) of the NLRA. (29 U.S.C. sec. 158(a) (3).)

Relying on this Court's recent opinion in *Bill Johnson's Restaurants Inc. v. N.L.R.B.*, ___ U.S. ___, 103 S.Ct. 2161 (1983), Petitioners now argue that they had a constitutional right to thus report their employees to the INS, regardless of motive. The Company contends that this contact with the INS is absolutely protected by the First Amendment right to petition the government. However, this Court's *Bill Johnson's Restaurants* opinion does not give employers—or anyone else—*carte blanche* to abuse governmental processes. While recognizing the right of employers to litigate meritorious claims in State courts, the Court expressly acknowledged that the right to litigate was *not* absolute. The Court carved out one exception, pointing out that "prosecution of an improperly motivated suit lacking a reasonable basis constitutes a violation of the Act that may be enjoined by the Board." (103 S.Ct. at 2171.) The Court analogized this "sham" exception to that created in the anti-trust context in *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972).

Amicus ALRB contends that Petitioners' conduct herein comes within the "sham" exception created by this Court in *Bill Johnson's Restaurants*. Although there, the Court describes this exception in terms of "baseless

litigation," Amicus contends that the exception was thus narrowly construed because of the factual context presented to the Court. A finding in the instant case that Petitioners' conduct is not entitled to immunity from unfair labor practice liability would comport with this Court's decision in *California Motor Transport Co. v. Trucking Unlimited*, *supra*, and with subsequent decisions of the Courts of Appeals dealing with the sham exception to the *Noerr-Pennington* doctrine.¹⁵

In *California Motor Transport Co.*, *supra*, this Court recognized that "First Amendment rights may not be used as the means or the pretext for achieving 'substantive evils.'" (404 U.S. at 515.) Accordingly, the Court found that a combination of entrepreneurs to harrass and deter their competitors from free and unlimited access to the courts and/or administrative agencies would violate anti-trust laws. Other courts, in construing the sham exception, have considered whether the efforts to obtain or influence legislative, judicial, or administrative actions are "bona fide" (*Clipper Express v. Rocky Mountain Motor Tariff*, 674 F.2d 1252, 1262 (9th Cir. 1982) or "genuine" (*Feminist Women's Health Center v. Mohammad*, 586 F.2d 580 (5th Cir. 1978).) In *Ernest W. Hahn, Inc. v. Codding*, 615 F.2d 830, 837, n. 8

¹⁵ *Eastern Rail. Pres. Conf. v. Noerr Motor Freight Inc.* 365 U.S. 127 (1961) and *United Mine Workers v. Pennington* 381 U.S. 657 (1965) together recognize a First Amendment exception to anti-trust liability which might otherwise arise from the joint action of competitors to obtain governmental action favorable to their interests. This Court was willing to extend the protection of the First Amendment, even if the end result and the motive for the joint action were anti-competitive.

(1980), the Ninth Circuit recognized that "There is no precise definition to the sham exception. . . . The easiest way to explain it is by saying the *Noerr-Pennington* doctrine does not exempt attempts to influence the government which are a sham."

Viewed in light of these standards, Petitioners' conduct must be held to be unprotected, because it indeed is a sham. Petitioners' purpose in contacting the INS was neither an effort to assist that agency in enforcing immigration laws, nor an expression of any *bona fide* desire to see immigration laws enforced. If that were the case, Employer would have notified the INS when it first suspected that its employees were undocumented. Instead, the Company sought to utilize the INS to accomplish its own illegal end, viz., to rid itself of a pro-union workforce. The fact that their hapless employees were, in fact, undocumented does not make Petitioners' report to the INS either "bona fide" or "genuine."¹⁶ The focus

¹⁶ In *Bill Johnson's Restaurants*, this Court held that if plaintiff prevails in a State court action, the NLRB cannot find an unfair labor practice based on the same conduct. That analysis fails to make allowance for either employer or union abuse of process. The tort of abuse of process recognizes that even successful litigation is not necessarily constitutionally protected. In *Alexander v. Unification Church of America*, 634 F.2d 673, 677 (2d Cir. 1980), the court pointed out that the thrust of the tort of abuse of process "is not commencing an action or causing process to issue without justification, but misusing or misapplying process justified in itself for an end other than that which it was designed to accomplish." (See also *Grip-Pak, Inc. v. Illinois Toll Works, Inc.* 694 F.2d 466, 471-472 (7th Cir. 1982) [Existence of a tort of abuse of process shows that it has long been thought that litigation could be used for improper purposes even when there is probable cause for the litigation . . .]; see also Prosser, *Handbook of The Law of Torts* (4th Ed. 1971), 836 ["[I]n an action for abuse of process it is unnecessary for the plaintiff to prove that the proceeding has terminated in his favor."])

for analysis is neither the immigration status of Petitioners' employees nor, as Employer correctly points out, Petitioners' motive in contacting the INS. Rather, what must be examined is the manner in which Petitioners used the administrative process. The *Noerr-Pennington* doctrine and this Court's *Bill Johnson's Restaurants* analysis are premised upon a legitimate use of the political, judicial, or administrative processes, even though the motive and, indeed, the effect of that use, may be either anti-competitive or coercive. Petitioners' contact with the INS can hardly be described as a legitimate use of that agency's processes.

In *Bill Johnson's Restaurants*, *supra*, the Court was concerned with safeguarding the employer's access to the courts as a means of redressing alleged wrongs. (103 S.Ct. at 217). The Court pointed out that, if the NLRB enjoined prosecution of a well-grounded, non-preempted lawsuit, the State plaintiff would be deprived of a remedy for an actual injury. Thus, given the employer's First Amendment right of access to the courts to redress such injuries and the State's interest "in protecting the health and well-being of its citizens," (103 S.Ct. at 2171), the Court concluded that the NLRB could not enjoin prosecution of a unpreempted State action solely because it might be retaliatorily motivated. In the instant case, however, the *only* "wrong" Petitioners sought to redress was the unionization of its workforce. Furthermore, although it has an interest in the health and well-being of the American people, the federal government has no interest in permitting an employer to knowingly

employ undocumented workers and then report those workers to the INS if they have the temerity to engage in activity protected by the NLRA. Employers' actions herein are unprotected by the First Amendment, not because they were retaliatorily motivated, but because of the particular factual circumstances of this case, i.e., Employer's continued knowing employment of undocumented workers *and* the company's report to INS only after notification from the NLRB that a union had been certified to represent its workers.

CONCLUSION

Petitioners' argument rests on the assumption that the policies embodied in the INA are in conflict with and prevail over those policies informing the NLRA; however, such is not necessarily the case. The national concerns addressed by the two acts can—and should—stand on an equal footing; they represent Congressional responses to two very different problems. As the foregoing discussion demonstrates, there is no conflict between the NLRB's remedies and national immigration policies. But even assuming, *arguendo*, that such conflict did exist, the reinstatement and backpay orders in this case represent only a minimal intrusion into the INS's responsibilities for controlling entry into the United States and conditions for naturalization.

Furthermore, this case presents compelling policy reasons for upholding the Board's remedies. With a sanctimonious appeal to the First Amendment, Petitioners are effectively urging this Court to legitimize unscrupu-

lous employer conduct. Employer utterly ignored federal immigration policy when to do so served its self-interest, but now invokes that same policy—under the imprimatur of the Constitution—since the locus of its self-interest has changed. It was to Petitioners' benefit to employ undocumented workers—until they voted for a union.

Amicus Agricultural Labor Relations Board is concerned with guaranteeing to all California farmworkers the protections of the Agricultural Labor Relations Act, California's counterpart to the National Labor Relations Act. In order to do so, Amicus—like the NLRB—must be permitted to remedy the commission of unfair labor practices against employees without regard to the immigration status of those employees. Accordingly, Amicus respectfully urges this Court to affirm the decision of the Court of Appeals.

DATED:

Respectfully submitted,

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MOTION FILED
SEP 23 1983

No. 82-945

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1982

SURE-TAN, INC., and SURAK LEATHER COMPANY
Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Seventh Circuit

**MOTION FOR LEAVE TO FILE AMICUS CURIAE
BRIEF AND BRIEF AMICUS CURIAE ON BEHALF
OF THE CALIFORNIA RURAL LEGAL
ASSISTANCE FOUNDATION**

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The California Rural Legal Assistance Foundation hereby moves this Court for leave to file the attached brief as amicus curiae in support of the position of Respondent National Labor Relations Board. Respondent has, through counsel, consented to the filing of this brief but Petitioners Sure-Tan, Inc. and Surak Leather Company have declined to consent to the filing.

The California Rural Legal Assistance Foundation, headquartered in Sacramento, California, was established in 1982. Many members of its governing body were formerly employed by or otherwise associated with California Rural Legal Assistance, Inc., which has provided legal services to farmworkers and other poor people throughout rural California since 1966. However, amicus California Rural Legal Assistance Foundation is a separate and distinct organization.

The Foundation's principal purposes

are to provide legal services, counseling and representation to migrant and seasonal farmworkers, rural Chicanos and other ethnic minorities and low income rural persons in California. Many of its constituents are now or were in the past undocumented aliens, primarily from Mexico. Many of these undocumented aliens have resided in California for years, and have citizen children. Most are employed, as fieldworkers in agriculture, in canneries and other food processing plants, and in the service industry, primarily in small restaurants. Most work alongside legally present workers. Those California Rural Legal Assistance Foundation (C.R.L.A.F.) constituents who work in the larger food processing plants and many who work in agriculture are unionized, but other workers are not, or are in the process of organizing.

Proposed amicus represents the undocumented and documented alien and

non-alien workers who will be affected by the Court's decision in this case, and thus presents a perspective different from that of the employer or the National Labor Relations Board. In addition, many constituents of prospective amicus were or represented farmworkers prior to passage of the California Agricultural Labor Relations Act, California Labor Code Section 1140, et seq. (ALRA), when labor relations were essentially unregulated in the agricultural sector. Amicus does not believe that such a state of affairs is beneficial to its constituents, and is concerned that, if the position of the employer is adopted, undocumented workers would essentially be excluded from the protections of the National Labor Relations Act, 29 U.S.C. Section 151 et seq. (NLRA), and possibly from the ALRA, leading to a return to deregulation for large sectors of the rural workforce.

Finally, amicus has had substantial

experience advocating for the needs of non-English speaking persons, and is currently supporting bills in the California legislature which would require Spanish language services by various state agencies.

For these reasons, the California Rural Legal Assistance Foundation moves that the Court grant it permission to file a brief amicus curiae.

Respectfully submitted,

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NO. 82-945

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

SURE-TAN, INC., AND SURAK LEATHER COMPANY,
Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Seventh Circuit

BRIEF AMICUS CURIAE ON BEHALF OF THE
CALIFORNIA RURAL LEGAL
ASSISTANCE FOUNDATION

INTERESTS OF AMICUS CURIAE

The interests of amicus curiae California Rural Legal Assistance Foundation are set forth in the accompanying motion for leave to file this brief.

SUMMARY OF ARGUMENT

Amicus submits that the remedial issues in this case, though by no means simple, can be decided according to principles long established and applied in other unfair labor practice proceedings. Amicus is confident that this Court will resist the Petitioner Employer's attempt to evade responsibility for its unfair labor practices by invoking the "bogeyman" of the supposed illegal alien menace and will decide the issue on its merits as it did in Plyler v. Doe, 457 U.S. 202 (1982).

Amicus has discussed only the remedial

issues herein because those are within its expertise and because the issue of whether the Petitioner committed an unfair labor practice has been briefed thoroughly by the Board and other amici. With regard to the remedial issues, amicus contends that the Board properly ordered reinstatement and back pay, without regard to the wrongfully discharged workers' immigration status. However, the specific amount of back pay and other availability issues can best be determined in compliance proceedings.

Both reinstatement and back pay are important remedies under the NLRA, and should not be denied except in the most exceptional cases. This case, or any other case where wrongfully discharged workers are undocumented, is not such an exceptional case. An award of reinstatement and back pay would not impinge on the immigration laws, but would rather further the purposes of those laws, insofar as such awards would

deter unscrupulous employers from employing and exploiting undocumented aliens. If reinstatement and back pay are not ordered, the wrongdoing Employer will receive a windfall, the innocent workers will not be made whole, and the loophole in the immigration laws which permits employers to hire undocumented workers without liability will be extended to the NLRA.

The discriminatees' back pay should not be tolled while they are available for and seeking work, whether here or in Mexico. Alternatively, even if the discriminatees are considered unavailable while in Mexico, they should be awarded back pay nonetheless. Such an award is necessary to return them to the status quo and to prevent the Employer from profiting from its actions in rendering them unavailable.

Finally, the ruling as to the contents of the reinstatement offer was well within the court's discretion and is correct.

ARGUMENT

I. REINSTATEMENT OF UNDOCUMENTED WORKERS IS A PROPER REMEDY UNDER THE NLRA AND DOES NOT CONFLICT WITH THE INA.

A. Reinstatement of Wrongfully Discharged Workers is Necessary to Effectuate the Purposes of the NLRA.

The National Labor Relations Board^{1/} is specifically authorized by Congress to order reinstatement of employees who have been the victims of unfair labor practices by their employer.^{2/} As this Court has noted, "Reinstatement is the conventional correction for discriminatory discharges." Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 187 (1941) "[W]ithout such a remedy

^{1/} Respondent National Labor Relations Board will be referred to herein as "the NLRB" or "the Board." Petitioners Sure-Tan, Inc. and Surak Leather Company will be referred to jointly as "the Employer." The employees whom the Board found to be the victims of the unfair labor practice will be referred to as "undocumented," consistent with this Court's terminology in Plyler v. Doe, 457 U.S. 202 (1982).

^{2/} Section 10(c), 29 U.S.C. Section 160(c).

industrial peace might be endangered because workers would be resentful of their inability to return to jobs to which they may have been attached and from which they were wrongfully discharged." Ibid., 313 U.S. 177, 195. Great deference is given to the Board's remedial orders by the courts, which generally do not disturb such orders on review unless they could not reasonably be said to effectuate the purposes of the National Labor Relations Act.^{3/} Shepard v. NLRB, ___ U.S. ___, 103 S.Ct. 665 (1983). This Court has even approved a Board reinstatement order which required an employer to resume operations which had been subcontracted out. Fibreboard Paper Products Corp. v. NLRB, 379 U.S. 203, 215-217 (1964).

The Board has consistently ordered reinstatement of wrongfully discharged workers, without regard to their immigration

3/ 29 U.S.C. Section 151, et seq., hereinafter "the NLRA" or "the Act."

status. See, e.g., Amays Bakery & Noodle Corporation, Inc., 227 N.L.R.B. 214 (1976).

The propriety of such a reinstatement order has been upheld by the Ninth Circuit. NLRB v. Apollo Tire Co., 604 F.2d 1180, 1182-84

(9th Cir. 1979). The Board originally issued such a general reinstatement order in this case, ^{4/} leaving the details to be worked out in a compliance proceeding in accord with its usual practice. ^{5/} The Seventh Circuit modified the order so as to require reinstatement only as to discriminatees who are legally in the country and authorized to work, although it indicated that such a result was not compelled by the immigration laws. ^{6/} This modification of

^{4/} 234 N.L.R.B. 1187 (1978); 246 N.L.R.B. 788 (1979) (denying General Counsel's Motion for Reconsideration).

^{5/} Coca-Cola Bottling Company of Louisville, 108 N.L.R.B. 490, 492-94 (1954); NLRB Case Handling Manual Sec. 10504. This Court has endorsed that procedure. Nathanson v. NLRB, 344 U.S. 25, 29-30 (1952).

^{6/} NLRB v. Sure-Tan, Inc., 672 F.2d 592, 605-06 (7th Cir. 1982).

the Board's order was outside the Court of Appeals' limited jurisdiction to review Board orders, and proposed amicus submits that the original Board order more nearly complies with the purposes of the NLRA.^{7/}

As recognized by the Seventh Circuit, Board reinstatement orders are generally upheld unless there is a showing of employee misconduct which relates to the employee's ability to perform his work duties or to compatibility between employee and employer, 672 F.2d 592, 604, factors not present in this case. A failure to order reinstatement would leave the undocumented employees less than whole, thus deterring those workers

^{7/} Although the Board did not file a Cross-Petition for Certiorari, this Court can review the propriety of the Seventh Circuit's modification of the reinstatement order under the "plain error" doctrine, Supreme Court Rule of Practice 40(1)(d)(2). The issue of the propriety of any reinstatement order has been touched upon by the Employer in its brief (Pet. Brief 19-20, 22) and briefed by several proposed amici. Cf. Procunier v. Navarette, 434 U.S. 555, 559, n. 6 (1978).

and other nonalien employees from exercising their rights under the Act in the future. It would also have the effect of making it virtually impossible for unions to organize a bargaining unit of undocumented and documented workers, as the undocumented would be afraid to sign authorization cards lest they be discharged without remedy. Moreover, even if they overcame that fear, they could be discharged after the union is certified as happened in this case, thus undermining the bargaining unit during the crucial initial year.^{8/} For these reasons, denial of unconditional reinstatement was proper only if necessary to avoid subverting other equally important federal policies, in this case those embodied in the

^{8/} NLRB v. Sure-Tan, Inc. (Sure-Tan I), 583 F.2d 355, 361 (1978). The problem is analogous to that which existed under the NLRA before the 1959 amendments when strikers not entitled to reinstatement were not permitted to vote in a representation election. See, Bio-Science Laboratories v. NLRB, 542 F.2d 505, 507-08 (9th Cir. 1976).

Immigration and Nationality Act (INA),
8 U.S.C. Section 1101 et seq.

B. Reinstatement of Undocumented Workers
Is Not Inconsistent With National
Immigration Policy.

1. It Is Not a Crime To Work in The
United States Without a Work
Authorization, or to Employ Such
Workers.

Despite the criticisms of judges^{9/}
and commentators,^{10/} the so-called "Texas
Proviso" to the INA, 8 U.S.C. Section
1342(a), exempts employers from penalties
for employing undocumented aliens. Congress
has repeatedly failed to enact employer

9/ Plyler v. Doe, supra, 457 U.S. 202, 218;
240 (Powell, J., concurring); U.S. v.
Acosta de Evans, 531 F.2d 428, 430 (9th Cir.
1976); Herrera v. U.S., 208 F.2d 215, 218
(Pope, J., concurring) (9th Cir. 1953),
cert. denied 347 U.S. 927 (1954).

10/ See, e.g., Comment: "Employer Sanctions:
The 'New Solution' to the Illegal Alien
Problem," 1979 Ariz. St. L.J. 439; Good-
paster: "Illegal Immigration," 1981 Ariz. St.
L.J. 651; Fogel: "Illegal Aliens: Economic
Aspects & Public Policy Alternatives," 15
San Diego L.Rev. 63 (1977); "Developments in
the Law: Immigration Policy & the Rights of
Aliens," 96 Harv.L.Rev. 1286, 1440 (1983).

sanctions legislation,^{11/} though such legislation has passed the Senate and is awaiting action on the floor of the House in the current session.^{12/} Unless it passes, Sure-Tan may continue to employ undocumented workers with impunity.

Nor is there any requirement that all alien workers possess labor certificates under 8 U.S.C. Sec. 1182(a)(4). The vast majority of immigrants are admitted because they are related to U.S. citizens or resident aliens, not because they have needed skills as evidenced by possession of a labor certificate.^{13/}

^{11/} The historical fate of proposed employer sanctions legislation is discussed in Comment: "Employer Sanctions," *supra*, n. 10; Developments, *supra*, n. 10, 96 Harv.L.Rev. 1286, 1435, n. 7; Lopez: "Undocumented Mexican Migration: In Search of a Just Immigration Law & Policy," 28 U.C.L.A. L.Rev. 615, 672 (1983).

^{12/} Immigration Reform and Control Act of 1983, S.529, H.R. 1510 (98th Cong.).

^{13/} It has been estimated that only 10% of
(footnote continued)

2. Reinstatement of Wrongfully Discharged Workers is Consistent With and Furthers the Goals of the INA.

The Employer avers that the objectives of the immigration laws "are clear--to protect American workers from an influx of foreign labor by imposing criminal sanctions on those who violate federal immigration laws." Pet. Brief at 23. The matter is far more complex.

First, as discussed supra,^{14/} a labor certification is required of only a very small percentage of immigrants. Most are admitted in furtherance of other goals,
Footnote 13/ continued

entering immigrants possess a labor certificate although 52% enter the labor market shortly after arrival. Fragomen & Del Rey: "The Immigration Selection System--A Proposal for Reform," 17 San Diego L.Rev. 1, 22-23 (1979), and that the process affects 1/13th of workers annually. Manulkin & Maghame: "A Proposed Solution to the Problem of the Mexican Alien Worker," 13 San Diego L.Rev. 42, 51 (1975). The Chair of the House Judiciary Committee has cited similar figures. Rodino: "The Impact of Immigration on the American Labor Market," 27 Rutgers L.Rev. 245, 266-270 (1974).

14/ Pp. 10 - 11 , n. 13.

e.g., family reunification. Second, the labor certification requirement was enacted in part to limit immigration and to increase the quality of immigrants.^{15/} Third, as discussed infra, the goal of the labor certification process is more accurately phrased as protection of decent wages and working conditions for the domestic work force than as protection of individual domestic workers. And finally, there is virtually unanimous agreement that the labor certification process serves no valid purpose and should be abolished.^{16/}

Insofar as a goal of the INA is protection of the American economy from "adverse working standards as a consequence of

^{15/} O'irman v. Regional Manpower Administrator, 336 F.Supp. 467, 471 (S.D.N.Y. 1971); Rodino, supra, n. 13, 27 Rutgers L.Rev. 245, 255.

^{16/} Rodino, supra, n. 13, 27 Rutgers L.Rev. 245, 272; Manulkin & Maghame, supra, n. 13, 13 San Diego L.Rev. 42, 43; Gordon: "The Need to Modernize Our Immigration Laws," 13 San Diego L.Rev. 1, 11-13 (1975); Developments, supra, n. 10, 96 Harv.L.Rev. 1286, 1348.

immigrant workers entering the labor market,"^{17/} these goals are furthered by a policy requiring reinstatement of undocumented workers like the discriminatees herein. Undocumented workers are attractive to unscrupulous employers even when legal alternatives like guestworkers are available, precisely because they are undocumented and thus vulnerable to exploitation and more likely to endure substandard wages and working conditions.^{18/}

^{17/} Sen. Rep. No. 748, 89th Cong., 1st Sess., 1965 U.S. Code Cong. & Adm. News 3328, 3329.

^{18/} See, e.g., Comment: "Illegal Entrants: The Wetback Problem in American Farm Labor," 2 U.C. Davis L.Rev. 55, 59 (1970); Comment: Employer Sanctions, supra, n. 10, 1975 Ariz. St. L.J. 439, 457; Goodpaster, supra, n. 10, 1979 Ariz. St. L.J. 651, 669; Fogel, supra, n. 10, 15 San Diego L.Rev. 63, 66, 70-71; Lopez, supra, n. 11, 28 U.C.L.A. L.Rev. 615, 629, 667; Developments, supra, n. 10, 96 Harv. L.Rev. 1286, 1437; U.S. Comptroller General: "Illegal Aliens: Estimating Their Impact on the U.S.," U.S. General Accounting Office (1980) (hereinafter "G.A.O. Report") at 9-18; Note: "Retaliatory Reporting of Illegal Alien

(footnote continued)

Because "[a] primary factor in achieving adequate wages in this country has been the effect of unions," Ozbirman v. Regional Manpower Administrator, supra, 335 F.Supp. 467, 472, organization of undocumented workers into unions will decrease their attractiveness vis-a-vis domestic workers and mitigate or eliminate any adverse consequences their presence may have on the domestic labor force.^{19/} Undocumented workers will be unlikely to join unions unless the full panoply of remedies

Footnote 18/ continued

Employers: Remedying the Labor-Immigration Conflict," 80 Colum.L.Rev. 1296, 1299 (1980). For a very early discription of the situation, see Hadley: "A Critical Analysis of the Wetback Problem," 21 Law & Contemporary Problems 334 (1956).

19/ In Kutchins & Tweedy: "No Two Ways About It; Employer Sanctions v. Labor Law Protections for Undocumented Workers," 5 Indust. Relations L.J. 339, 343-44 (1983), reference is made to a study which found, not surprisingly, that the 16% of undocumented workers who belonged to unions earned more and had better working conditions than their non-unionized fellows.

available under the NLRA, including reinstatement, is available to them.

Finally, reinstatement of wrongfully discharged workers, documented or not, will not be a major factor in encouraging undocumented immigration. That phenomenon already exists, fueled by socio-economic factors,^{20/} by the willingness of employers like Sure-Tan to hire undocumented workers, and probably by the de facto policies of Congress and the Immigration & Naturalization Service.^{21/} Remedying clear violations

^{20/} Those factors usually cited are the "push" of poor economic conditions in Mexico plus the "pull" of jobs in the U.S., and/or the existence of a "secondary labor market" in the U.S. comprising jobs which domestic workers refuse to perform. See, e.g., G.A.O. Report, supra, n. 18, at 10; Developments, supra, n. 10, 96 Harv.L.Rev. 1286, 1438 et seq. The proximity of the U.S. and Mexico and their historical interconnection is also relevant.

^{21/} The thesis is that our actual immigration policy has been to encourage undocumented workers to accept jobs in the U.S., as evidenced by failure to enact employer sanctions legislation, sporadic

(footnote continued)

of national labor policy by reinstating the instant discriminatees will have little effect on the nation's immigration problems, but failure to fully remedy the blatant unfair labor practice committed by Sure-Tan will certainly have a detrimental effect on national labor policy.

C. The Southern Steamship Holding Is Not Inconsistent With Reinstatement of Undocumented Workers.

Amicus agrees with the Employer that Southern Steamship Co. v. NLRB, 316 U.S. 31 (1942) requires the Board to consider national policies other than those embodied in the NLRA. The Board did so when it ordered reinstatement of the discriminatees

Footnote 21/ continued

enforcement of the immigration law, and underfunding of the Border Patrol. See generally, Hadley, supra, n. 18; Lopez, supra, n. 11; Developments, supra, n. 10, 96 Harv.L.Rev. 1286, 1440. This Court has also recognized the theory. Plyler v. Doe, supra, 457 U.S. 202, 218-219.

herein, which, as both the Board and the Ninth Circuit recognize, will further the goals of the INA insofar as it will 22/ deter employment of undocumented workers. The factual holding of Southern Steamship, that strikers who had engaged in criminal activity which harmed their employer should not be reinstated, is consistent with long-standing Board policy, as discussed supra at p. 7, and is not applicable in this case.

22/ NLRB v. Apollo Tire Co., supra, 604 F.2d 1180, 1183; 246 N.L.R.B. 788. Indeed, one might surmise that John and Steve Surak, owners of the Employer, hired the discriminatees because they were aliens, if not because they were undocumented, and thus vulnerable. During a previous organizing campaign at the Employer's predecessor, also owned and operated by the Suraks, John commented, when told that his Mexican employees were signing union cards: "A Mexican boy should know better because I can get a new Mexican every day." Surak and Surak, d/b/a Nat'l. Rawhide Mfg. Co., 202 N.L.R.B. 893, 894 (1973).

II. THE UNDOCUMENTED DISCRIMINATEES
WERE CORRECTLY AWARDED BACK PAY.

The Board originally awarded back pay to the unlawfully discharged undocumented workers in this case, leaving computation of the precise amount to a compliance proceeding.^{23/} The Court of Appeals modified the order so as to award back pay for a minimum six month period or longer if the discriminatees were "lawfully available" for employment, which the Court apparently intended to mean legally in the U.S. and/or authorized to work. The Court of Appeals and the Board assumed, apparently, that back pay should be tolled while discriminatees are out of the country.^{24/} The Board

^{23/} 234 N.L.R.B. 1187 (1978); 246 N.L.R.B. 788 (1979) (denying General Counsel's Motion for Reconsideration).

^{24/} N.L.R.B. v. Sure-Tan, Inc., *supra*, 672 F.2d 592, 605-06; Order and Judgment of Court of Appeals, entered July 12, 1982, App. 25a.

accepted the Court's modification in this case, but did not purport to "articulate a general remedial policy for such cases."^{25/}

The Employer disputes the propriety of any back pay award and contends that such an award would encourage illegal immigration. Pet. Brief at 19-24.

Amicus contends that a back pay award was within the Board's authority and not inconsistent with the INA. Amicus also believes that the Seventh Circuit opinion in this case should be upheld, given the length of time which has expired and the concomitant difficulty of locating the discriminatees.^{26/} However, amicus agrees with

the Board that such matters as the amount of time a discriminatee would have worked

25/ N.L.R.B. Brief Opp. Cert. 3, n. 8.

26/ The specific reasons why the Seventh Circuit order is reasonable are detailed in the brief of proposed amici Mexican-American Legal Defense and Education Fund and National Lawyers Guild and will not be repeated here.

and his actual availability for work are more appropriately determined in compliance proceedings.^{27/} Amicus does not agree, however, that back pay should automatically be tolled while discriminatees are out of the country.

A. Back Pay Should Generally Be Awarded.

This Court has held on several occasions that back pay will be awarded wrongfully discharged discriminatees, absent exceptional circumstances. "Making the workers whole for losses suffered on account of an unfair labor practice is part of the vindication of the public policy which the Board enforces." Phelps Dodge, Inc. v. NLRB, supra, 313 U.S. 177, 197.

^{27/} As discussed in n. 7, supra, even though the Board did not cross-petition for certiorari, this Court has jurisdiction to decide whether the Court of Appeals exceeded its limited scope of review by modifying the Board's initial remedial order.

The purpose of a back pay award is not only to deter future violations of the Act. Back pay is also a remedy designed to restore, so far as possible, the status quo that would have obtained but for the wrongful act. NLRB v. Rex-Rutter Mfg. Co., 396 U.S. 258, 265 (1969), reh. denied, 397 U.S. 929 (1970). The discriminatees in this case would have continued to work had they not been discharged due to an unfair labor practice, and they should be made whole by a back pay award. Such an award is not punitive—merely remedial. The six months back pay ordered herein is not a "fine" against the employer for hiring undocumented aliens. It is, rather, compensation to the victims of an unfair labor practice.^{28/}

^{28/} The fact that the amount of back pay is more than a fine would be is irrelevant. The back pay award in Rex-Rutter was \$160,000. 396 U.S. 258, 261.

B. An Award of Back Pay Is Consistent With the INA.

Nor would a back pay award undermine the INA. To the contrary, as argued supra in connection with reinstatement, awarding back pay will discourage employers from hiring undocumented workers insofar as such awards will remove some potential for exploitation. If back pay is not awarded, employers will be able to hire undocumented and call INS at the first sign of union activity, secure in the knowledge that the maximum penalty will be a cease and desist order.

The function served by a back pay award has been recognized by the Board in several analogous cases involving underage ^{29/}employees. In most cases, the employer 29/ Laredo Packing, 241 N.L.R.B. 184 (1979); New Foodland, Inc., 205 N.L.R.B. 418 (1973); El Paso Manor, Inc., 159 N.L.R.B. 1649 (1966); The Embers of Jacksonville, Inc., 157 N.L.R.B. 627 (1966). The only exception has been when the employee lied about her age. Justrite Mfg. Co., 238 N.L.R.B. 52 (1978).

knew the employees were underage but used that fact as a pretext for discharging them after a union organizing campaign had begun. In all such cases, back pay was awarded from date of discharge to date of reinstatement, including the period when the employee was underage, the theory being that otherwise employers would be encouraged to violate the child labor laws.

Similar rulings have been made by state courts, which have permitted recovery of wages earned by but not paid to undocumented persons. The rationale for these rulings was explained by the Alaska Supreme Court as follows:

"[S]ince the purpose of [section 212(a)(14) of the INA] would appear to be the safeguarding of American labor..., the [employee's] contract should be enforced because such an objective would not be furthered by permitting employers knowingly to employ excludable aliens and then, with impunity, to refuse to pay them for their services."

Gates v. Rivers, Alaska Spr. Ct., 515 P.2d

1020, 1022 (1973).^{30/} These comments are applicable to Sure-Tan.

C. Back Pay Issues Are Best Determined In Compliance Proceedings.

Given the six years which have elapsed since the discharge and the difficulty of reconstructing Sure-Tan's business history and the discriminatees' work histories since then, the Court of Appeals acted correctly in awarding six months back pay.^{31/} Amicus

30/ Cf. Peterson v. Neme, 222 Va. 477, 281 S.E.2d 869, 872 (1981) (undocumented alien permitted to recover lost wages as element of tort damages, even though she lacked work authorization); Arteaga v. Literski, 83 Wis.2d 128, 265 N.W.2d 148, 150 (1978) (undocumented aliens may sue landlord in tort, since otherwise landlords would be encouraged to rent to undocumented).

31/ The difficulty is compounded by the fact that the discriminatees are apparently unable to be located. It is not clear from the record whether the Board had an opportunity to obtain current addresses and other information in light of their hasty departure. NLRB Case Handling Manual Section 10269. In this context, it might be noted that the Southern Steamship rule that federal agencies should accomodate

(footnote continued)

would urge, however, that "such issues are best determined in compliance proceedings, where evidence can be taken as to the seasonal or nonseasonal nature of the business, employee turnover, and the length of the employee's stay in the United States.

D. Back Pay Should Not Be Tolled While Discriminatees Are Not in the U.S.

Generally, back pay is tolled during periods when a claimant is unavailable for work, out of the labor market, or not

Footnote 31/ continued

other federal agencies applies to the INS as well as to the Board. There seems to be no reason why the INS could not have delayed departure of the discriminatees until after the unfair labor practice proceeding or at least until the discriminatees were deposed, especially given its willingness to exercise "prosecutorial discretion" to refrain from deporting deportable aliens in other situations. See Roberts: "The Exercise of Administrative Discretion Under the Immigration Laws," 13 San Diego L.Rev. 144 (1975); Wildes: "The Operating Instructions of the I.N.S.--Internal Guides or Binding Rules," 17 San Diego L.Rev. 99 (1979); Plyler v. Doe, supra, 457 U.S. 202, 226.

seeking work. Phelps Dodge Corp. v. NLRB,
supra, 313 U.S. 177, 197-99. Unavailability
is defined quite narrowly, however, as lim-
ited to being ill, institutionalized, or in
jail. NLRB Case Handling Manual Sec.10612.
The Board has held that absence from the
country does not necessarily constitute
unavailability, at least while the alien is
working abroad. In M Restaurants, Inc.,
d/b/a The Mandarin, 238 N.L.R.B. 1575 (1978),
enforced 621 F.2d 336 (9th Cir. 1980), a
discriminatorily discharged worker returned
to Taiwan after he was unable to find em-
ployment in California. The Board awarded
back pay for that period, less his earnings
in Taiwan, commenting:

"The Board will not permit a wrong-
doer to evade liability to a dis-
criminatee who has left the local
job market to secure employment...
and lessen his expenses when he
has been unable to find employ-
ment in the area of his unlawful
discharge." 32/

32/ See following page for footnote.

Even if the discriminatees are not considered available while in Mexico, however, they should be awarded back pay pursuant to another longstanding Board policy, that back pay is awarded even for periods of unavailability when the employer caused the unavailability. In Graves Trucking, Inc., 246 N.L.R.B. 344 (1979), for example, the Board awarded back pay for a period when an employee was injured and unable to work, because the injury was inflicted by the employer. The Board commented that such an award was "not reparation" but rather "the only way to restore [the employee] as nearly as possible to the economic position he would have obtained, but for [the employer's] unlawful conduct." 246 N.L.R.B. 344, 345. The Board similarly

32/ (from previous page)

238 N.L.R.B. 1575, 1577. This ruling is consistent with longstanding Board policy. Gary Aircraft Co., 210 N.L.R.B. 555, 557 (1974); Champa Linen Service, 222 N.L.R.B. 940 (1975); International Trailer Co., 150 N.L.R.B. 1205, 1213 (1965).

awards back pay for periods when an employee is disabled because of an industrial accident in a second job. American Manufacturing Company of Texas, 167 N.L.R.B. 520, 522 (1967). It is Sure-Tan which has caused the instant discriminatees to be absent from the labor market, and thus the burden of compensating them should fall on the company.^{33/}

Of course, the employees should be required to seek work while in Mexico. Their interim earnings may be low, but the facts of this case fit within Board doctrine justifying low interim earnings under special circumstances, for example when unemployment is high, the employee belongs to a disadvantaged group, or the employee has been blackballed.^{34/}

^{33/} This argument is made in Note: Retaliatory Reporting, supra, n. 18, 80 Columbia L.Rev. 1296, 1311-15.

^{34/} NLRB Case Handling Manual Sec.10616.3;
(footnote continued)

Finally, back pay need not accrue indefinitely, but rather could terminate according to usual rules, e.g., when the employee finds equivalent work or when he would have been laid off or quit. This date can be determined in a compliance proceeding.

E. Discriminatees Should Not Be Denied Back Pay for Periods When They are Physically Present in the U.S.

The court apparently ruled that back pay should not be awarded unless discriminatees are legally in the U.S. and authorized to work.^{35/} This is inconsistent with

Footnote 34/ continued

M Restaurants, Inc., supra; Moss Planning Mill Co., 116 N.L.R.B. 68, 70 (1956); NLRB v. Pugh & Barr, Inc., 231 F.2d 558, 559 (4th Cir. 1956).

^{35/} The Court's order of July 12, 1982, refers to "lawful availability." App. 28a. The Court appeared to assume, however, that interim earnings accrued during such a period would be deducted from the back pay award.

Board policy which awards back pay for periods when a discriminatee is under a legal disability, provided that the employer knew of the disability and would have continued to employ the worker, notwithstanding the disability. The Board followed this procedure in the underage worker cases cited supra, n. 29, as well as in Operating Engineers Local 57 (M.A. Gammino Construction Co.), 108 N.L.R.B. 1225, 1227-28 (1954), where back pay was awarded for a period when an operating engineer did not have a valid state license, and Robinson Freight Lines, 129 N.L.R.B. 1040, 1042, 1047-48 (1960), where back pay was awarded to a truck driver who did not have a valid chauffers license. The rationale of these cases is that the award is necessary to make the employee whole, as s/he would have continued to be employed, even though under a legal disability, but for the unfair labor practice. That rationale is applicable to this case.

The discriminatees would have been employed, despite their immigration status, but for the unfair labor practice, and they should be compensated for their lost wages.

III. THE REINSTATEMENT OFFER WAS PROPERLY ORDERED.

The Employer also challenges the specific requirements of the reinstatement offer ordered by the court.^{36/} The order was properly tailored to the facts of this case.^{37/}

Contrary to the Employer's contention, the Board does on occasion require a reinstatement offer to be kept open until the discriminatee is able to accept it, even if for a considerable period of time. Usually this occurs when a discriminatee is in the

^{36/} 672 F.2d 592, 606.

^{37/} NLRB Case Handling Manual Sec. 10528 requires that reinstatement offers be varied according to the circumstances of the particular case.

army, in which case he is offered employment to be accepted within a reasonable period of time after release.^{38/} While the exact time when discriminatees would have been available might have been better left to a compliance proceeding, four years seems reasonable.^{39/}

Similarly, the court acted within its discretion in requiring the reinstatement offers to be sent to Mexico and that receipt be verified. It is the employer who chose to hire Mexican nationals rather than Illinois natives and it is not unfair to put the burden of contacting them on that

38/ NLRB Case Handling Manual Sec. 10528.1. NLRB v. Revlon Products Corp., 144 F.2d 88 (2d Cir. 1944).

39/ One cannot infer that, because the employees chose voluntary departure, they were deportable. The INS has been criticized for coercing voluntary departure without first informing aliens of their rights. Developments, supra, n. 10, 96 Harv.L.Rev. 1286, 1389-90; U.S. Commission on Civil Rights: "The Tarnished Golden Door: Civil Rights Issues in Immigration" at 97, 101 (1980).

employer. Moreover, it is the employer who caused the employees to relocate to Mexico.^{40/} It is settled that difficulty in locating former employees is not an excuse for failing to offer them reinstatement. As the court noted in American Machinery Corp. v. NLRB, 424 F.2d 1321, 1328 (5th Cir. 1970), "A concerned employer will find the means to cope with this burden."

Finally, the court properly ordered that the notice be in Spanish. The Employer chose to hire employees who spoke little or no English and there is evidence that he communicated with them to some extent in Spanish. 234 N.L.R.B. 1187, 1190. Obviously, the reinstatement offer will be meaningless if the employees to whom it is directed are unable to understand it.

40/ There is evidence that the Employer made a practice of hiring Mexican nationals as long ago as 1971. Surak and Surak d/b/a/ Nat'l. Rawhide Mfg. Co., supra, 202 N.L.R.B. 893, 894.

Both Congress and the California Legislature have recognized that many non-English speaking persons live in this country and that, to be effective, communication must be in their native languages. The federal Voting Rights Act, for example, requires state and local political subdivisions to provide bilingual voting materials in any area where five percent or more of the population speak a language other than English. 42 U.S.C. Sec. 1973aa-1a(b). This Court has interpreted Title VI of the Civil Rights Act of 1964, 42 U.S.C. Sec. 2000d, to require the provision of services in languages other than English, if necessary to effectively serve non-English speaking recipients of federal funds. Lau v. Nichols, 414 U.S. 563 (1974). The U.S. Department of Justice has similarly interpreted Title VI. 28 C.F.R. Sec. 42.405(d).

Many southwestern states, which were once part of Mexico and have long had

substantial numbers of non-English speaking residents, have been even more solicitous of their non-English speaking citizens. As the California Supreme Court observed in Castro v. California, 2 Cal.3d 223, 243 (1970), in striking down a section of the State Constitution which restricted the franchise to citizens literate in English:

"[I]t would indeed be ironic that petitioners, who are the heirs of a great and gracious culture, identified with the birth of California and contributing in no small measure to its growth, should be disenfranchised in their ancestral land, despite their capacity to cast an informed vote."

Recognizing that many citizens and permanent residents live in the state, the California Legislature has required that services be provided in Spanish in a variety of areas. The Dymally-Alatorre Bilingual Services Act, Calif. Gov't. Code Sec. 7290, et seq., for example, requires state and local governmental agencies to

provide services in languages other than English. In enacting this law, the Legislature found: "The Legislature further finds and declares that substantial numbers of persons who live, work and pay taxes in this state are unable, either because they do not speak or write English at all, or because their primary language is other than English, effectively to communicate with their government." Calif. Gov't. Code Sec. 7291. The Legislature has also required the State Department of Motor Vehicles to furnish Spanish language versions of the motor vehicle laws, Calif. Vehicle Code Sec. 1656(b), and the agency which administers the unemployment insurance program to furnish informational pamphlets in Spanish. Calif. Unemployment Insurance Code Sec. 316.

Nor has the duty to provide non-English material been limited to state agencies. California Civil Code Sec. 1632 requires businesses to provide Spanish language

contracts to consumers when the negotiations have been primarily in that language. The Ninth Circuit has ruled that the duty extends to unions as well. Retana v. Hotel Workers Local 14, 453 F.2d 1018, 1024 (9th Cir. 1972) held that it could be a breach of the duty of fair representation for a certified collective bargaining agent to fail to provide copies of the collective bargaining agreement and other assistance in Spanish to its many monolingual Spanish members. The Court's observations are applicable to Sure-Tan:

"It is not difficult to conceive a set of facts...in which a minority group of union members were effectively deprived of an opportunity to participate either in the negotiation of the collective bargaining agreement or in the enjoyment of its benefits by a language barrier which union officials exploited or took no steps to overcome."

The Board and the Court of Appeals acted well within their authority in ordering Spanish language notices by Sure-Tan

to preclude further exploitation of the discriminatees herein.

CONCLUSION

Amicus urges this Court to affirm the ruling of the Court of Appeals, except insofar as it automatically tolled accrual of back pay while discriminatees were absent from the U.S. Amicus also urges this Court to suggest to the Board that in the future reinstatement and back pay issues be determined in compliance proceedings. In no event should the harm done to the discriminatees be left unremedied, keeping in mind the admonition of a judge of the Court of Appeals which covers much of the Southwest:

"If the NLRA were inapplicable to workers who are illegal aliens we would leave helpless the very persons who most need protection from exploitative employer practices such as occurred in this case."

NLRB V. Apollo Tire Co., supra, 604 F.2d

1180, 1184 (Kennedy, J., concurring).

Dated: September , 1983.

Respectfully submitted,

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MOTION FILE
SEP 23 1983

No. 82-945

IN THE

Supreme Court of the United States

October Term, 1983

SURE-TAN, INC. and SURAK LEATHER COMPANY,

Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit.

**Motion for Leave to File Amici Curiae Brief
and Amici Curiae Brief of Mexican American
Legal Defense and Education Fund and
National Immigration Project of the
National Lawyers' Guild.**

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Questions Presented.

1. Does an employer violate Section 8(a)(1) and (3) of the National Labor Relations Act where the employer knowingly employs undocumented aliens but then reports them to the Immigration and Naturalization Service immediately after they vote to be represented by a union, which causes them to be arrested by the INS and to leave the United States?

2. Does the National Labor Relations Board have the power to tailor the conventional reinstatement and backpay remedy to the unique remedial problems raised by such a violation of the Act?

3. Should any offer of reinstatement conditioned on the employee's legal reentry to the United States remain open for at least four years to provide the employee a reasonable period to attempt to reenter legally and be written in both Spanish and English?

4. Should the Board have discretion to require the employer to pay a minimum amount of backpay even if the discriminatee does not gain legal reentry to the United States and cannot immediately accept an offer of reinstatement, if the Board concludes that such an award is necessary to effectuate the purposes of the Act?

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No. 82-945
IN THE
Supreme Court of the United States

October Term, 1983

SURE-TAN, INC. and SURAK LEATHER COMPANY,
Petitioners,
vs.
NATIONAL LABOR RELATIONS BOARD,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit.

**Motion of the Mexican American Legal
Defense and Educational Fund
and the National Immigration Project
of the National Lawyers' Guild for
Leave to File Amici Curiae Brief.**

The Mexican American Legal Defense and Educational Fund, Inc. ("MALDEF") and the National Immigration Project of the National Lawyers' Guild respectfully move for leave to file a brief as *amici curiae* in support of respondent National Labor Relations Board. Respondent has consented to the filing of this brief; Petitioners refuse consent.

A. Interest of Amici Curiae.

MALDEF is a national civil rights organization established in 1968. Its principal objective is to secure the civil rights of Hispanics living in the United States, both documented and undocumented, through litigation and educa-

tion. MALDEF has always had an interest in assuring that the rights of Hispanics are protected in the workplace without regard to their legal status. In support of these goals, MALDEF has undertaken extensive litigation in the areas of immigrants' rights in regard to employment, Immigration and Naturalization Service procedures, and social welfare benefits. *See, e.g., Plyler v. Doe*, 457 U.S. 202 (1982).

The National Immigration Project of the National Lawyers' Guild, Inc., is a non-profit organization of attorneys, law students, legal and community workers dedicated to protecting the rights of immigrants, both documented and undocumented, in the United States. It has a special interest in the outcome of this case, because of the unique problems facing undocumented workers. The National Immigration Project of the National Lawyers' Guild recognizes that without adequate remedies for labor law violations committed against these employees, employers will have an incentive to violate additional laws, knowing that this segment of the workforce is vulnerable to exploitation.

B. Summary of Argument.

Undocumented aliens are "employees" under the National Labor Relations Act. This Court should give substantial deference to the Board's interpretation of the term "employee" particularly where, as here, the Board's interpretation is consistent with the language of the Act and necessary to effectuate the policies of the Act. To exclude undocumented aliens from the Act would disrupt the union certification and collective bargaining process and would provide an incentive to employers to hire undocumented workers.

Sure-Tan committed an unfair labor practice by reporting its undocumented workers to the INS in retaliation for their support of a union. While it is certainly not an unfair labor practice for an employer to attempt to enforce the immigration laws in a non-discriminatory manner, it should be an unfair labor practice for an employer who knowingly

employs undocumented aliens to report them to the INS because they voted for a union. Sure-Tan's report to the INS is not immunized from liability under the First Amendment or the immigration laws. Sure-Tan was not suffering any injury at the hands of the undocumented aliens, and its report to the INS was not an effort to seek redress of grievances from the government.

The Board should have discretion to tailor the conventional remedies of reinstatement and backpay to the unique remedial problems posed by this case. An offer of reinstatement should be conditioned on the discriminatee gaining legal reentry to the United States, but the offer should be kept open at least 4 years in light of the substantial delays incurred by aliens seeking legal entry. In order to deter unfair labor practices, the employer should be liable for some amount of backpay even if the employees do not gain legal reentry and cannot immediately accept a reinstatement offer. Backpay should not be entirely tolled by the employees' absence from the United States since the employees did not voluntarily leave this country and did not wilfully incur any portion of their loss. A contrary rule would give employers free license to exploit undocumented aliens and to violate the Act.

Wherefore the Mexican American Legal Defense and Educational Fund, Inc. and the National Immigration Project of the National Lawyers' Guild respectfully requests that their motion to file an *amici curiae* brief be granted.

Respectfully submitted,

MUNGER, TOLLES & RICKERSHAUSER,
PETER R. TAFT,
ALLEN M. KATZ,

By PETER R. TAFT,
Attorneys for Amici Curiae.

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**Amici Curiae Brief of Mexican American
Legal Defense and Educational Fund and
National Immigration Project of the
National Lawyers' Guild.**

STATEMENT OF THE CASE.

Respondents ("Sure-Tan") are commonly-owned small leather processing firms located in Chicago. Sure-Tan was aware in 1976 that most of its approximately eleven employees were Mexican nationals who had not been legally admitted to the United States.¹

A union organization drive began at Sure-Tan in July 1976, and on August 12, 1976, the Union filed an election

¹Sure-Tan, Inc., 234 NLRB 1187, 1190 n.3 (1978) (finding of Administrative Law Judge). In fact, John Surak executed an affidavit on January 10, 1977, stating that several months before December 1976, he had been told by a "confidential source" that none of his employees possessed proper immigration papers. *Id.*

petition. Sure-Tan attempted to coerce the workers into voting against the Union by suggesting that there would be less work if the Union won² and by interrogating them about their union sympathies, followed by ethnic slurs.³

On December 10, 1976, Sure-Tan's employees voted six to one to designate the Union as their representative for collective bargaining.⁴ Sure-Tan filed objections to the election alleging, *inter alia*, that six of the seven voters were aliens who had not been legally admitted to the United States.⁵ On January 17, 1977, in a Supplemental Decision on Objections, the Board's Acting Regional Director overruled the objections and certified the Union.⁶

Sure-Tan received the Supplemental Decision on objections on January 19, 1977. The next day, Sure-Tan sent a letter to the Immigration and Naturalization Service ("INS") requesting it "to check the emigration [sic] status of several [of] our employees who are Mexican nationals."⁷ The Board found that Sure-Tan's request to the INS was motivated by the employees' support of the Union.⁸ (Sure-Tan also refused to negotiate with the Union, resulting in a Board complaint and eventual order to negotiate with the Union.)⁹

²*Id.* at 1189-90.

³*NLRB v. Sure-Tan, Inc.*, 672 F.2d 592, 596 (7th Cir. 1982).

⁴*Sure-Tan, Inc.*, 231 NLRB 138 (1977).

⁵*Id.*

⁶*Sure-Tan, Inc.*, 231 NLRB 138, 139 (1977). Sure-Tan timely requested the Board to review the Acting Regional Director's decision. The Board, on February 17, 1977, denied the request as raising no substantial issues warranting a hearing. *Id.*

⁷*Sure-Tan, Inc.*, 234 NLRB 1187, 1189 (1978) (finding of Administrative Law Judge).

⁸*Id.* at 1191.

⁹*Sure-Tan, Inc.*, 231 NLRB 138 (1977). The Union filed a charge on March 1, 1977 alleging a refusal to negotiate with the Union. The Board issued a complaint on March 16, 1977. After the complaint was answered by Sure-Tan, the Board's General Counsel moved for summary judgment. The matter was transferred from the ALJ to the Board which granted the motion for summary judgment and ordered Sure-Tan to bargain with the Union. *Id.* The Board's Order was enforced by the United States Court of Appeals for the Seventh Circuit. *NLRB v. Sure-Tan, Inc.*, 583 F.2d 355 (1978).

As a direct result of Sure-Tan's letter, INS agents visited Sure-Tan's premises on February 18, 1977.¹⁰ The agents arrested five employees who, later that same day, executed INS Form I-274 by which they acknowledged that they were Mexican citizens not legally admitted to the United States. Each employee accepted voluntary departure from the United States as a substitute for deportation and was placed on board a bus bound for El Paso, Texas and the border.¹¹

The Board issued complaints alleging that Sure-Tan constructively discharged the five employees because of their union activities.¹² An Administrative Law Judge, after a hearing, found that Sure-Tan's letter to the INS was motivated by the employees' support of the Union,¹³ that the employees left the United States as a proximate result of Sure-Tan's action, and that Sure-Tan had therefore violated Section 8(a)(1) and (3) of the Act.¹⁴

The Administrative Law Judge recommended as a remedy that Sure-Tan send offers of reinstatement to the five discriminatees at their last known addresses in Mexico and that the offers of reinstatement be held open for six months to afford the discriminatees an "opportunity to return legally and accept reinstatement."¹⁵ The Administrative Law Judge denied any backpay relief since the employees' being physically unavailable for employment after their return to Mexico, in his view, nullified any backpay liability under existing Board precedent.¹⁶ He recommended, however, that the Board consider awarding at least four weeks' backpay.

¹⁰*Sure-Tan, Inc.*, 234 NLRB 1187, 1189 (1978).

¹¹*NLRB v. Sure-Tan, Inc.*, 672 F.2d 592, 599 (7th Cir. 1982).

¹²*Sure-Tan, Inc.*, 234 NLRB 1187, 1188 (1978).

¹³*Id.*

¹⁴*Id.* at 1191. The Administrative Law Judge emphasized that his finding "does not foreclose an employer from making a similar request [to the INS] where its request is not motivated by their employees' union activities or protected concerted activities." *Id.* at 1191, n.5.

¹⁵*Id.* at 1192-93.

¹⁶*Id.* at 1192-93.

As he noted, "without an award of some backpay, the violations herein will largely go unremedied and the Employer may be encouraged to adopt an apparently foolproof system of defeating union organizational attempts. Consequently, some backpay award can act as a deterrent to similar future violations."¹⁷

By Decision and Order dated March 6, 1978, the Board affirmed the Administrative Law Judge's findings but modified his proposed Order. The Board noted that there was no evidence in the record as to whether the five constructively-discharged employees had returned to the United States. The Board therefor ordered its conventional remedy of reinstatement with backpay, but pointed out that the appropriate forum for determining any issues relating to the employees' availability for work would be a compliance proceeding.¹⁸

The Board's General Counsel filed a motion for clarification, claiming that the Order would encourage discriminatees to return illegally to claim reinstatement, rather than wait to reenter the United States legally. The General Counsel requested that the Board require reinstatement only if the discriminatee reenters lawfully and that all backpay be denied unless the discriminatee is denied employment after his lawful return.¹⁹

The Board denied the General Counsel's motion.²⁰ The remedial policies of the Act, it held, would best be effectuated by affording unconditional reinstatement. The usual procedures applied by the Board for locating discriminatees should be followed. Discriminatees located but found to be unavailable for work, including unavailability due to absence from the United States, would have their backpay tolled accordingly. If there was a long delay in locating

¹⁷*Id.* at 1193.

¹⁸*Id.* at 1187.

¹⁹*Sure-Tan, Inc.*, 246 NLRB 788 (1979).

²⁰*Id.*

discriminatees, backpay would be placed in an escrow account for a two-year period.²¹ The Board reiterated that the appropriate forum for implementing the Order was a compliance proceeding, which would provide "the factual determinations as to locations and availability."²²

The Court of Appeals modified the Board's Order and enforced it as modified. *NLRB v. Sure-Tan, Inc.*, 672 F.2d 592 (7th Cir. 1982). It held that the evidence supported the Board's finding that anti-union animus motivated Sure-Tan to write the INS. The Court noted that John Surak, a co-owner of the company, was well aware that his employees were undocumented aliens, yet he did nothing about it until after the Union won the election.²³ "A contrary holding," the Court reasoned, "would encourage employers to hire illegal aliens, who would for all practical purposes be stripped of NLRA protection and who could be fired with impunity at the first hint of union sympathy."²⁴

With respect to the reinstatement issue, the Court of Appeals held that the Board's Order should be modified to require reinstatement only if the discriminatees are legally present and free to be employed in this country when they offer themselves for reinstatement.²⁵ The Court reasoned that the reinstatement offer should be left open for four years to afford the discriminatees "liberal but reasonable" opportunity to obtain legal entry.²⁶ The Court of Appeals also held that the reinstatement offers should be written both in Spanish and English.

²¹*Id.* citing NLRB Casehandling Manual (Part III) § 10644. The Casehandling Manual provides that any funds attributable to employees who cannot be located are refunded to the employer. *Id.* § 10584.2(c). See also *NLRB v. Sure-Tan, Inc.*, 672 F.2d 592, 606 n.19 (7th Cir. 1982).

²²*Sure-Tan, Inc.*, 246 NLRB 788, n.6 (1979).

²³*NLRB v. Sure-Tan, Inc.*, 672 F.2d 592, 600 (7th cir. 1982).

²⁴*Id.* at 601.

²⁵*Id.* at 606.

²⁶*Id.*

With respect to backpay, the Court of Appeals agreed with the Board that in computing backpay, discriminatees will generally be considered unavailable for work (and backpay liability tolled) during any period when the discriminatee was not lawfully present in the United States.²⁷ The Court held, however, that it would better effectuate the purposes of the Act to set a minimum amount of backpay which the employer must pay in any event and found that six-months' backpay appeared to be reasonable. The Court of Appeals therefore enforced the Board's Order as modified,²⁸ but gave the Board leave "if it sees fit" to modify the Order further by setting a minimum period of six months' backpay.²⁹ In its judgment and order of July 12, 1982, however, the Court of Appeals required that each discriminatee be awarded a minimum of six months' backpay.

²⁷*Id.*

²⁸The Court of Appeals reduced the escrow period from two years to one year.

²⁹*Id.* at 606.

ARGUMENT.

I.

UNDOCUMENTED ALIENS ARE "EMPLOYEES" WITHIN THE MEANING OF THE NATIONAL LABOR RELATIONS ACT.

The Board has consistently held that undocumented aliens are "employees" within the meaning of Section 2(3) of the Act³⁰ and that they are thus entitled to the protection of the Act.³¹ The Board's interpretation is entitled to deference. In *NLRB v. Hearst Publications*, 322 U.S. 111, 130 (1944), the Court stated that the "task" of defining the term "employee," "has been assigned primarily to the agency created by Congress to administer the Act," and emphasized the Board's expertise in this area.

The theme of deference to the Board in interpreting and applying the Act sounds in numerous opinions of this Court.³² The Court has stated that it will generally defer to the Board's defensible construction of the Act.³³ Only if the Board's decision regarding the meaning of the Act is unsupported by "substantial evidence on the record considered as a

³⁰*NLRB v. Sure-Tan, Inc.*, 583 F.2d 355 (1978), involved the Board's effort to obtain enforcement of its Order requiring Sure-Tan to negotiate with the Union. In that appeal, Sure-Tan argued that the bargaining Order was improper because six of the seven eligible voters were undocumented aliens who had since left the country. *Id.* at 358. The Court of Appeals rejected this argument, holding that undocumented aliens "are employees under the Act, and therefore are fully eligible voters." *Id.* at 359. Sure-Tan did not seek review by this Court of that decision.

³¹*See Amay's Bakery & Noddle Co.*, 227 NLRB 214 (1976) (undocumented aliens discharged in violation of the Act entitled to reinstatement with backpay); *Apollo Tire Co.*, 236 NLRB 1627 (1978), *enfd.* *NLRB v. Apollo Tire Co.*, 604 F.2d 1180 (9th Cir. 1979); *Sure-Tan, Inc. and Surak Leather Co.*, 231 NLRB 138 (1977), *enfd.* 583 F.2d 355 (7th Cir. 1978); *Duke City Lumber Company, Inc.*, 251 NLRB 53 (1980); *Viracon, Inc.*, 256 NLRB 245 (1981).

³²In *Beth/Israel Hospital v. NLRB*, 437 U.S. 483, 500-501 (1978), for example, the Court noted that, "It is the Board on which Congress conferred the authority to develop and apply fundamental national labor policy." *See also, NLRB v. Seven-Up Bottling Co.*, 344 U.S. 344, 346 (1953); *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 236 (1963).

³³*NLRB v. Local 103, Int'l Ass'n of Ironworkers*, 434 U.S. 335, 350 (1978).

whole” or is inconsistent with the fundamental policies of the Act, will the Court refuse to follow the Board’s interpretation.³⁴

In *NLRB v. Hearst Publications*, *supra*, the Court emphasized the breadth and flexibility of the Act’s definition. The statute as a whole, from which the term “employee” “takes color,” “must be read in the light of the mischief to be corrected and the end to be attained.” *Id.* at 124. Congress designed the National Labor Relations Act to promote industrial peace by establishing a system of collective bargaining and to reduce the disparity in bargaining power between employers and employees. S. Rep. No. 573, 74th Cong., 1st Sess. 1-3 (1935). These underlying policies amply support the Board’s decision that undocumented alien workers must be included within the purview of the Act.

Significant numbers of undocumented aliens work on a permanent or semi-permanent basis alongside American workers in the same or competing places of business.

“Sheer incapability or lax enforcement of the laws barring entry into this country, coupled with the failure to establish an effective bar to the employment of undocumented aliens, has resulted in the creation of a substantial ‘shadow population’ of illegal migrants -- numbering in the millions -- within our borders. This situation raises the specter of a permanent caste of undocumented resident aliens, encouraged by some to remain here as a source of cheap labor. . . .” *Plyler v. Doe*, 457 U.S. 202, 102 S.Ct. 2382, 2395-96 (1982).

Although this Court has referred to an Attorney General estimate of between 3 and 6 million,³⁵ more recent Census Bureau analysis suggests that the number is substantially lower — possibly as low as 2 million, of whom approxi-

³⁴See *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 491 (1951); *American Ship Building Co. v. NLRB*, 380 U.S. 300, 318 (1965); and *NLRB v. Brown*, 380 U.S. 278, 291 (1965).

³⁵*Plyler v. Doe*, 457 U.S. 202, 102 S.Ct. 2382, 2395 n.17 (1982).

mately 900,000 were born in Mexico.³⁶

Undocumented aliens labor increasingly in industries which are the focus of efforts to promote collective bargaining. The undocumented alien work force is no longer primarily concentrated in agriculture, a sector of the economy explicitly exempted from the coverage of Section 2(3) of the Act.³⁷ Undocumented workers have entered the urban, industrial workforce, working beside workers whose ability to bargain collectively has been the traditional concern of the Act and the Board.³⁸

Unless undocumented aliens are eligible to vote as "employees" in labor elections, an employer could easily frustrate the union certification process, as *Sure-Tan* sought to do here. If employees attempt to unionize and a union wins a certification election, the employer could seek to have the election results decertified on the ground that a critical number of "for-union" votes were cast by undocumented workers.³⁹ Not only would this ability to obtain decertification provide an incentive for the employer to hire undocumented aliens in order to secure a docile foreign labor force, it would have the further effect of depriving the employer's other employees of their own rights under the statute.

Exclusion of undocumented aliens from the Act thus jeopardizes the rights of all workers to bargain effectively. It would make the undocumented alien more attractive to many

³⁶Jeffrey S. Passel and Robert Warren, "Estimates of Illegal Aliens from Mexico Counted in the 1980 United States Census" (1983, Population Division, U.S. Bureau of the Census).

³⁷Wayne A. Cornelius, Leo R. Chavez, Jorge G. Castro, *Mexican Immigrants and Southern California: A Summary of Current Knowledge* (1982).

³⁸Although the number of undocumented aliens working in industry has increased, the evidence does not support the commonly held view that undocumented aliens take jobs away from citizens and legally admitted workers. See generally Wayne Cornelius, *Mexican Migration to the United States: Causes, Consequences and U.S. Responses* 52-71 (1983).

³⁹See, e.g., *NLRB v. Sure-Tan, Inc.*, 583 F.2d 355, 360 (7th Cir. 1978).

employers than legally resident workers.⁴⁰ The true beneficiary of the recognition that coverage of the Act extends to undocumented aliens is the collective bargaining system itself. "[T]he lasting benefit [of allowing aliens to vote in labor elections] goes not to the law violators — the aliens — but rather to the Union, which is not accused of wrongdoing." *NLRB v. Sure-Tan, Inc.*, 583 F.2d 355, 360 (7th Cir. 1978).

II.

SURE-TAN COMMITTED AN UNFAIR LABOR PRACTICE UNDER SECTIONS 8(a)(1) and (3) OF THE ACT BY REPORTING ITS UNDOCUMENTED ALIEN EMPLOYEES TO THE IMMIGRATION AND NATURALIZATION SERVICE IN RETALIATION FOR THEIR UNION ACTIVITY.

A. Sure-Tan Constructively Discharged Its Undocumented Alien Employees.

The Board's determination that an action constitutes an unfair labor practice is subject to only limited judicial review: "[I]n light of the Board's special competence in applying the general provisions of the Act to the complexities of industrial life, its interpretations of the Act are entitled to deference. . . ." *Bill Johnson's Restaurants, Inc. v. NLRB*, 103 S.Ct. 2161, 2170, 76 L.Ed.2d 277 (1983).

"[I]n the nature of things Congress could not catalogue all the devices and stratagems for circumventing the policies of the Act Congress met these difficulties by leaving the adaptation of means to end to the empiric process of administration. The exercise of the process was committed to the Board, subject to limited judicial review." *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941); *NLRB v. Seven-Up Bottling Co.*, 344 U.S. 344, 348 (1953); *NLRB v. J. Weingarten*, 420 U.S. 251, 266-267 (1975).

⁴⁰*NLRB v. Apollo Tire Co.*, 604 F.2d 1180, 1183 (9th Cir. 1979); *NLRB v. Sure-Tan, Inc.*, 583 F.2d 355, 360 (7th Cir. 1978).

The Court of Appeals applied the two-part test for constructive discharge formulated in *NLRB v. Haberman Construction Co.*, 641 F.2d 351, 358 (5th Cir. 1981) (*en banc*):

“First, the employer’s conduct must have created working conditions so intolerable that an employee is forced to resign. Second, the employer must have acted to encourage or discourage membership in any labor organization within the meaning of Section 8(a)(3) of the Act.”

Petitioners do not dispute that the anti-union animus element of this test was fully proved. Instead, they argue that the mandatory departure of their employees from the United States was not the proximate result of the employers’ actions.

The Board’s finding, however, was supported by testimony by an INS representative that the INS visited the Sure-Tan facility as a “direct result” of the letter from Sure-Tan. This evidence was undisputed by the employer and amply supports the Administrative Law Judge’s conclusion that “but for [Sure-Tan’s] letter to Immigration, the discriminatees would have continued to work indefinitely for [Sure-Tan].” *Sure-Tan, Inc.*, 234 NLRB at 1191 (1978).

The constructive discharge doctrine was created precisely to deal with situations where a direct termination by the employer cannot be shown, but where the employer sets in motion the “intolerable” circumstances which eventually result in the departure of the employees. The actions of Sure-Tan are just the sort of creative “circumvention” of the purposes of the Act which the Board is empowered to prevent.

The Board’s conclusion that Sure-Tan’s report to the INS was a violation of the Act is consistent with the usual criteria by which the Board defines such violations and is not inconsistent with the policies underlying the immigration laws. As the Board and the Court of Appeals have stressed, it is the context of Petitioners’ request to the INS that makes the report an unfair labor practice: “It should be emphasized

. . . that the finding herein *does not* foreclose an employer from making a similar request where its request is not motivated by their employees' union activities or protected concerted activities." *Sure-Tan, Inc.*, *supra*, 234 NLRB at 1191 n.5.

The Board and the Court of Appeals have not said or suggested that it is an unfair labor practice to enforce the immigration laws. They have merely said that it is impermissible selectively to call in the INS for the purpose of thwarting the collective bargaining process. This result is fully consistent with the immigration laws. Indeed, as the Court of Appeals observed,

"[A] contrary holding would encourage employers to hire illegal aliens, who would for all practical purposes be stripped of NLRA protection and who could be fired with impunity at the first hint of union sympathy." *NLRB v. Sure-Tan, Inc.*, 672 F.2d 592, 601 (7th Cir. 1982)

The timing of an employer's action may properly be considered to determine whether an unfair labor practice has occurred. *Sure-Tan* was aware of the undocumented status of its employees long before the election. In fact, numerous threats were made to report pro-union employees to the INS.⁴¹ *Sure-Tan's* practice of employing undocumented aliens remained unchanged, however, up to the moment of union victory. Only then did *Sure-Tan* write the INS. Such a sudden change in policy after a union victory in an election is considered "an important factor in determining the validity of an inference of discrimination."⁴² *Sure-Tan* argues

⁴¹Such threats in themselves have consistently been regarded as unfair labor practices. See e.g., *George Glickley*, 175 NLRB 1084 (1969); *Viracon, Inc.*, 256 NLRB 245, 246 (1981).

⁴²See e.g., *NLRB v. Montgomery Ward & Co., Inc.*, 554 F.2d 996, 1000-02 (10th Cir. 1977); *NLRB v. Treasure Lake, Inc.*, 453 F.2d 202 (3d Cir. 1971); *NLRB v. Master Slack*, 618 F.2d 6 (6th Cir. 1980).

Evidence of contemporary unfair labor practices, such as were found in the instant case, is also relevant to establishing an anti-union motive for a challenged action. See e.g., *NLRB v. Tom Wood Pontiac, Inc.*, 447 F.2d 383, 386 (7th Cir. 1971). *Sure-Tan's* request to the INS was preceded by other unfair labor practices, including threats to employees and improper interrogation.

that it was only being civic-minded⁴³ when it called in the INS, but has totally failed to explain why it chose not to report its workers to the INS until *after* the union election.

Sure-Tan also argues that its actions were not the proximate cause of the discriminatees' departure from the United States because they elected voluntary departure after their arrest by the INS agents. This argument misapplies common notions of proximate causation. Sure-Tan's conduct clearly caused the arrest of the discriminatees by the INS. At that point, the discriminatees had the "option" of remaining in custody and undergoing a deportation proceeding, or of signing INS Form I-274 stating they agreed to leave the United States by a specified date. *See* 8 U.S.C. § 1252(b); 8 C.F.R. § 242.5.

Sure-Tan's letter to the INS was therefore the direct cause of the discriminatee's losing their jobs.⁴⁴ Moreover, since the loss of employment was clearly a foreseeable and intended result of Sure-Tan's letter, Sure-Tan's action should be considered the proximate cause of the discriminatees' having lost their jobs.⁴⁵

⁴³Sure-Tan is incorrect in suggesting that it was under a legal duty to report its workers to the INS. No federal statute puts an affirmative duty on an employer to investigate or disclose the immigration status of his workers. While Congress now is considering legislation which would make it unlawful knowingly to hire an undocumented alien, this Court should not recognize a legal duty which Congress has not yet and may not impose. *See* S. 592, 98th Cong., 1st Sess. (1983); H.R. 1510, 98th Cong., 1st Sess. (1983). Moreover, even if Congress enacted a law prohibiting the employment of undocumented aliens, such a law would not necessarily immunize an employer who complies with the law in a discriminatory fashion -- knowingly hiring undocumented workers and then reporting them to the INS because of their union activity.

⁴⁴As the leading treatise on the law of torts states: "If the defendant's conduct was a substantial factor in causing the plaintiff's injury, it follows that he will not be absolved from liability merely because other causes have contributed to the result, since such causes, innumerable, are always present." Prosser, *Law of Torts*, § 41, p.240 (4th ed. 1971).

⁴⁵*See* generally Prosser, *Law of Torts*, §§ 43 & 44 at pp. 250-288 (4th ed. 1971). As there stated: "Obviously the defendant cannot be relieved from liability by the fact that the risk, or a substantial and important part of the risk, to which he has subjected the plaintiff has indeed come to pass." *Id.*, § 44 at p. 273.

B. Neither the Immigration Laws nor the Constitution Immunize Sure-Tan's Illegal Discrimination.

Sure-Tan's argument that it cannot be an unfair labor practice to report an undocumented alien to the INS should be rejected. It is well established that if the reason asserted by an employer for a discharge is pretextual, the fact that the action taken is otherwise laudable or legal is not controlling. Even evidence of a "good-faith motive" for the discriminatory action "has not been deemed an absolute defense to an unfair labor practice charge." *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 230 n.8 (1963).

Analogous to the present case are cases involving under-age employees. Employers in businesses such as liquor sales or heavy machinery, which require employees above a certain minimum age, have often discharged pro-union under-age employees in the midst of union organizing campaigns. In response to charges of discriminatory termination, these employers have argued that the discharge was in each case mandated by local, state, or federal minimum-age laws. The Board has consistently rejected this defense where the employer knew of the age problem and would not have discharged the employee but for his union activity:

"The existence of a legitimate reason to discharge an employee is no defense to an alleged unlawful discharge where that legitimate reason is not a moving cause of the discharge. If the reason asserted by an employer for a discharge is a pretext, then the nature of the pretext is immaterial. That is true even where the pretext involves a reliance on state or local laws."⁴⁶

⁴⁶*New Foodland, Inc.*, 205 NLRB 418, 420 (1973). See also *The Embers of Jacksonville, Inc.*, 157 NLRB 622, 631 (1966), *enfd.* 64 LRRM 2681 (5th Cir. 1967) (busboys known to the employer to be legally under-age discharged only after union organizing began); *Justrite Manufacturing Co.*, 238 NLRB 57, 65-66 (1978) (employer aware machine operator under minimum age long prior to discharge, ostensibly for age, after refusal to sign anti-union petition).

Petitioners also argue that, under *Bill Johnson's Restaurants, Inc. v. NLRB*, 103 S.Ct. 2161, 76 L.Ed.2d 277 (1983), their report to the INS is immunized from a finding of an unfair labor practice because it was an exercise of their "First Amendment right to petition the government."

Bill Johnson's is distinguishable from the present case on several grounds. In *Bill Johnson's*, a waitress filed charges with the Board alleging she had been fired because of her efforts to organize a union. She and other employees then picketed the restaurant and leafletted customers. The owners of the restaurant filed suit in state court against the demonstrators, charging they had harassed customers, blocked access and libelled the plaintiffs. The Board found that the filing of this lawsuit constituted an unfair labor practice. The Court of Appeals affirmed. This Court reversed.

The Court in *Bill Johnson's* emphasized that the customary deference shown the decisions of the Board was overcome for two reasons. First, depriving the employer of the right to pursue an action in court would leave him no forum in which to pursue a remedy for an "actual injury." 103 S.Ct. at 2169-2170. The Court repeatedly noted that the employer alleged that he suffered harm at the hands of the former employees. The right to petition is the right to go "to a judicial body for redress of alleged wrongs." *Id.* at 2169. The Court cited numerous decisions establishing the principle that an employer has the right to seek judicial protection from tortious conduct in a labor dispute. *Id.* at 2169.

The reasoning of *Bill Johnson's* does not apply to Sure-Tan. Sure-Tan cannot and does not claim that it suffered wrongs at the hands of its undocumented alien employees. It did not petition the INS for "redress of grievances." Sure-Tan suffered no actual injury which it sought to redress by writing the INS. It knowingly employed undocumented aliens and no federal or state law to which it was subject penalized it for continuing to retain its undocumented workers.

The Court in *Bill Johnson's* also emphasized the principles of federalism which underlay its decision that resort

to a state court should not be an unfair labor practice: "[I]n recognition of the States' compelling interest in the maintenance of domestic peace, the Court has construed the Act as not preempting the States from providing a civil remedy for conduct touching interests 'deeply rooted in local feeling and responsibility.' " *Id.* at 2169. Sure-Tan's request, in contrast, went to a federal agency. No consideration of federalism or compelling state interest is involved.⁴⁷

III.

THE BOARD SHOULD HAVE THE DISCRETION TO TAILOR THE CONVENTIONAL REMEDIES OF REINSTATEMENT AND BACKPAY TO THE UNIQUE REMEDIAL PROBLEMS RAISED BY THIS CASE.

Under Section 10(c) of the Act, the Board has the responsibility of devising remedies to effectuate the policies of the Act. This Court has repeatedly recognized that the Board has broad discretion to fashion remedies subject to limited judicial review. *See, e.g., Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941).

The Board's power to fashion backpay and reinstatement awards in particular is "a broad discretionary one. . . ."

⁴⁷Sure-Tan's reliance on two cases interpreting the antitrust laws is similarly misplaced. Sure-Tan's letter to the INS cannot be equated with the political campaign mounted by the railroad companies in *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), to influence the election process. In any event, the *Eastern Railroad* decision is an interpretation of the Sherman Act. While the constitutional right to petition is discussed, it is only to note that the court will not "lightly impute to Congress" the "intent to invade these freedoms." *Id.* at 138.

California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508 (1972), is also inapposite. To begin with, the Court held in that case that even First Amendment rights to petition for redress of grievances are subject to regulation under the antitrust laws, "when they are used as an integral part of conduct which violates a valid statute." *Id.* at 514. The Court's statement that it is not a violation of the antitrust laws for groups with common interests to utilize the procedures of state and federal agencies and courts, "to advocate their causes and points of view respecting resolution of their business and economic interests vis a vis their competitors," *id.* at 511, has no bearing here. There was no dispute between competitors, and no actual injury to Sure-Tan which prompted it to petition the government to correct a grievance.

Such power:

“is for the Board to wield, not for the courts. . . . When the Board, ‘in the exercise of its informed discretion,’ makes an order of restoration by way of backpay, the order ‘should stand unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act.’ ” *National Labor Relations Board v. Seven-Up Bottling Co.*, 344 U.S. 346-47 (1953).

The more detailed and particularized the issue, the greater deference is due the Board. Discussing the Board’s formula for computation of backpay, this Court has stated:

“It is not for us to weigh these or countervailing considerations. Nor should we require the Board to make a quantitative appraisal of the relevant factors . . . As is true of many comparable judgments by those who are steeped in the actual workings of these specialized matters, the Board’s conclusion may ‘express an intuition of experience which outruns analysis and sums up many unnamed and tangled impressions . . .,’ and they are none the worse for it . . . ‘[t]he Board was created for the purpose of using its judgment and its knowledge.’ ” *Id.* at 348.

This Court has also recognized that the normal policy of the Board is to fashion first a general remedy and then to modify that remedy in compliance proceedings to suit individual cases. *NLRB v. J. H. Rutter-Rex Manufacturing Co.*, 396 U.S. 258, 260 (1969).⁴⁸

The Board’s expertise and long experience in handling factual issues of backpay and reinstatement awards in compliance proceedings is evidenced by the detailed procedures and policies set forth in the Board’s *Casehandling Manual*.⁴⁹ The Board has standard procedures for dealing with missing

⁴⁸See also *Trico Products Corp. v. NLRB*, 489 F.2d 347, 353-54 (2d Cir. 1973) (“[c]ompliance proceedings will be necessary to determine the amount of backpay . . .”).

⁴⁹See Part III, §§ 10584.2-3, 10612-622, 10644.

discriminatees, for determining whether or not the discriminatee should be considered unavailable for work, and for handling the problem of long delays in locating the discriminatee. Under the conventional practices of the Board, the employer is protected from injustice by the ability to introduce evidence in the compliance proceeding tending to show that in individual cases, the general award of the Board should be modified.⁵⁰

A. Reinstatement Conditioned on Legal Reentry to the United States.

The Board ordered *Sure-Tan* to offer the discriminatees unconditional reinstatement, indicating that the Order would be implemented in detail in the compliance proceeding.⁵¹ The Court of Appeals modified this Order to "require reinstatement only if the discriminatees are legally present and legally free to be employed in this country when they offer themselves for reinstatement."⁵² While the Court of Appeals' Order departs from conventional practice by modifying the conventional remedy of reinstatement prior to the compliance proceeding, there is ample Board precedent for conditioning remedies on the satisfaction of certain conditions.⁵³

⁵⁰*NLRB v. Robert Haws Company*, 403 F.2d 979, 981 (6th Cir. 1968); *NLRB v. Miami Coca-Cola Bottling Co.*, 360 F.2d 569, 575 (5th Cir. 1966).

The employer may show that the discriminatee is not entitled to backpay, for example, because he has left the labor market or has refused to accept alternative work. See *NLRB v. The Madison Courier, Inc.*, 472 F.2d 1307, 1316-18 (D.C. Cir. 1972). Backpay awards may also be reduced where the employer can prove that the discharge would have occurred shortly after the discriminatory discharge because of financial difficulties or the insolvency of the business. See, e.g., *Trico Products Corp. v. NLRB*, 489 F.2d 347, 353-54 (2d Cir. 1973).

⁵¹*Sure-Tan, Inc.*, 246 NLRB 788 (1979).

⁵²*NLRB v. Sure-Tan, Inc.*, *supra*, 672 F.2d at 606.

⁵³In *Justrite Manufacturing Co.*, 238 NLRB 57 (1978), the employer committed an unfair labor practice by firing an under-age employee because of her union activity. The Board ordered that the employee should be offered full reinstatement. Since the employee had reached her eighteenth birthday at the time the Board ruled, her reinstatement was to be immediate. Yet seniority was to commence effective only on the date of the discriminatee's birthday. *Id.* at 68. See also, *New Foodland, Inc.*, 205 NLRB 418 (1973); *The Embers of Jacksonville, Inc.*, *supra*, 157 NLRB 627 (1966), *enfd.*, 64 LRRM 2681 (5th Cir. 1967).

An offer of reinstatement conditioned on legal reentry to the United States would not, of course, encourage illegal entry, but should operate as an incentive *against* illegal reentry. Such an offer thus disposes of the potential conflict with the immigration laws that exists if unconditional reinstatement is offered.⁵⁴

B. The Reinstatement Offer Should Be Kept Open for Sufficient Time to Provide the Discriminatee With a Reasonable Opportunity to Gain Legal Entry.

The Board generally requires that each victim of discrimination should be given "adequate time" to accept an offer of reinstatement in view of the particular factual circum-

⁵⁴As a practical matter, it is doubtful that an offer of reinstatement conditioned on legal reentry would in fact alter the already great incentives for Mexican workers to enter this country illegally. As this Court has recognized, legal benefits provided in the United States are of no consequence as a spur to immigration. *Plyler v. Doe*, *supra*, 102 S.Ct. at 2401. Ample incentive exists for undocumented immigration regardless of any specific job offer. The overriding motivation, according to authoritative studies, is simply "to get a job." David S. North and Marion F. Houston, *The Characteristics and Role of Illegal Aliens in the U.S. Labor Market: An Exploratory Study* (1976). The undocumented alien worker is attracted to the United States labor market because the market offers better wages and working conditions than can be obtained in the country of origin. Select Commission on Immigration and Refugee Policy, *U.S. Immigration Policy and the National Interest, Final Report*, 31-36 (1981); Alejandro Portes, "Undocumented Immigration and the International System: Lessons from Recent Legal-Mexican Immigrants to the United States," in Rios-Bustamante, Antonio (ed.) *Mexican Immigrant Workers in the United States*, 74 (1981). Most relevant to the Sure-Tan situation, a leading study has determined that the Chicago area in particular was the "most preferred" site for obtaining jobs because of high pay scales. Wayne A. Cornelius, *Mexican Migration to the United States: Causes, Consequences, and U.S. Responses* 21 (1978).

There is also evidence that even without an offer of reinstatement outstanding, deported undocumented alien workers return to the United States, often even to the same employers, shortly after they have been compelled to leave the country. One 1981 study based on INS and Social Security Administration data indicated that more than half of the undocumented aliens apprehended in 1975 had returned to the United States labor force by 1980, once again without the required documentation. David S. North, *Government Records: What They Tell Us About The Role Of Illegal Immigrants In The Labor Market And In Income Transfer Programs* 39-46 (1981).

stances of each case.⁵⁵ "An important element to be considered in determining the validity of an offer of reinstatement is whether it affords the offeree a reasonable period of time to consider it." *NLRB v. Murray Products, Inc.*, 584 F.2d 934, 940 (9th Cir. 1978). The period of time designated as "reasonable," "depends on the situation in which the offeree finds himself as a result of the discrimination against him." *Id.*

The flexible nature of the "reasonableness" requirement, dependent as it is on the particular circumstances of each case, make irrelevant Petitioners' recitation of past cases finding short time periods to be "reasonable." Petitioner's Brief, 29-30. The Board should have the discretion to decide that in the situation of an undocumented alien constructively discharged by his employer, a reasonable period of time is that required for the discriminatee to secure permission from the United States government to reenter the country legally or to exhaust avenues of obtaining such permission. The available evidence suggests that the four-year period adopted by the Seventh Circuit is the bare minimum if the discriminatee is to have a realistic opportunity to accept the offer, since it may well take that long or more for those discriminatees eligible to gain legal entry to do so.⁵⁶ Absent such an opportunity, the offer of reinstatement would be illusory.

⁵⁵3 NLRB Casehandling Manual 10528.14 (1977); *Miami Coca-Cola Bottling Company*, 151 NLRB 1701, 1706-07, n.4 (1965), *enfd.* in relevant part, 360 F.2d 569 (1966).

⁵⁶The undocumented alien who is deported or voluntarily departs this country must apply for permission to reenter the United States legally through the office of the United States consul in the country of his origin. An undocumented alien resident in the United States must go through the same process to acquire a visa for permanent residence. The time required for both categories of the undocumented to obtain the proper visa or to exhaust the process is the same. The acceptance of voluntary departure, as in the instant case, does not prejudice the consideration of the visa application.

Recent United States Department of State information regarding visas indicates that applications by Mexican nationals seeking visas to work in the United States are generally backlogged between five and nine years. U.S. Department of State, Visa Office, "Bulletin," May 13, 1983, in American Council for Nationalities Service, *Interpreter Re-*

C. The Board Should Have Discretion to Impose a Minimum Amount of Backpay Even if the Discriminatee Is Absent From the Labor Market Due to the Unfair Labor Practice.

A backpay award is generally remedial in nature and serves to restore the discriminatee to the economic position he would have enjoyed but for the discrimination.⁵⁷ Yet the Board and the courts should consider that the purpose of such a "make whole" order is not so much to achieve "private reimbursement" but the "vindication of the public policy" which the Board enforces.⁵⁸ The backpay order may not be used in a "purely punitive manner," but a backpay order is to be utilized "in aid of the Board's authority to deter unfair labor practices."⁵⁹ As this Court has stated, a backpay order:

"somewhat resemble[s] compensation for private injury, but it must be constantly remembered that [it is a] remedy created by statute . . . designed to aid in achieving the elimination of industrial conflict. [It] vindicate[s] public, not private rights." *Virginia Electric and Power Co. v. NLRB*, 319 U.S. 553, 543 (1943).

While there must be a "remedial" purpose in the backpay award, the Board does have broad discretionary power so long as the award effectuates the purposes of the Act: In solving the problems which arise in backpay cases, the

leases, Vol. 60, no. 18, May 12, 1983. The only aliens with waiting times less than five years are those who qualify as "Members of the professions or persons with exceptional ability in the sciences or arts, who have job offers in the U.S., provided that a shortage of U.S. workers exists" (third preference), and those who qualify as "Skilled or Unskilled Workers in occupations in which there is a shortage of U.S. workers," and have a job offer at the prevailing wage rate (sixth preference). These two categories constitute only 20% of the available visas. *Id.*

⁵⁷*Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 198 (1941).

⁵⁸*NLRB v. The Madison Courier, Inc.*, 472 F.2d 1307, 1316 (D.C.Cir. 1972).

⁵⁹*NLRB v. United Marine Division*, 417 F.2d 865, 868 (2d Cir. 1969), cert. denied, 397 U.S. 1008 (1970).

Board is vested with "the discretionary power to mould remedies suited to practical needs." *NLRB v. Seven-Up Bottling Co.*, 344 U.S. 344 351-52 (1953). The "make whole" standard is not the only measure of damages permissible under the broad rubric of "remedial" purpose. The Board and the courts have recognized that there is an "alternative requirement of a remedial measure: the depriving of respondent of an advantage gained in violation of the Act." *NLRB v. Coats & Clark, Inc.*, 241 F.2d 556, 562 (5th Cir. 1957).

The fact that the discriminatees were aliens who were not legally entitled to remain in the United States and have since left the United States should not deprive the discriminatees of the right to receive monetary compensation for the employer's unfair labor practice. Contrary to Petitioners' arguments, undocumented aliens are in fact eligible for various federal and state benefits, including benefits designed to compensate for injuries and benefits under some "pay-in" social welfare programs to which the undocumented alien employee has made contributions.⁶⁰

In ordinary circumstances, the Board treats periods absent from the country as time unavailable for work and backpay is tolled accordingly.⁶¹ In the present case, however, the employer's unfair labor practice proximately caused the departure from the United States of the undocumented aliens. Neither the deterrent nor the make-whole purposes of the

⁶⁰Undocumented workers can recover back wages and obtain injunctive relief under the Fair Labor Standards Act, which sets minimum wage and maximum hour standards. 29 U.S.C. §§ 201-219; *Gates v. Rivers Constr. Co.*, 515 P.2d 1020 (Alaska 1973); *Brennan v. El San Trading Corp.*, 73 Lab. Cas. 46,361 (1973). In some states, including Illinois, they are eligible for workers' compensation benefits. Ill. Ann. Stat. ch. 48; Cal. Lab. Code § 3600. Other programs for which undocumented aliens can qualify under certain circumstances include Social Security Disability, Retirement and Survivor's Benefits; Supplemental Security Income; and Maternal and Child Health and Crippled Children's Services. 42 U.S.C. § 402(n); 42 U.S.C. § 1382c(a)(1)(B); 20 C.F.R. § 416.202 & 416.203; 42 U.S.C. §§ 701 et seq.

⁶¹3 NLRB Casehandling Manual § 10612 (1977).

remedial provisions of the Act will be satisfied if backpay liability is tolled from the instant the discriminatees departed the United States. Absent some backpay award, the employer will escape all monetary liability for its deliberate retaliation against its employees because of their union activity.

Backpay should not be tolled where the unavailability of the employee for work is a direct result of the employer's unfair labor practice. In *Moss Planning Mill Co.*⁶² for example, an employer injured a worker, disabling him temporarily, in the course of committing an unfair labor practice. The Board rejected the argument that the backpay award should be tolled because the injury made the employee unavailable for work: "[A]s [the employee's] incapacity to work . . . following his discharge was caused by the injury inflicted upon him by the [employer], we shall not abate backpay for such period."⁶³

The Board has codified this rule in its *Casehandling Manual*, which provides that "injuries resulting from unfair labor practices may not toll backpay."⁶⁴ The same rationale should apply where, as here, the employer's unfair labor practice has directly forced the employee to leave the United States and be unavailable for work.

For the same reason, the employer's offer of reinstatement should not terminate the period for which backpay is payable since the discriminatees were unable immediately to accept the offer of reinstatement because of the employer's unfair labor practice. As this Court has had occasion recently to observe, the general rule⁶⁵ that a reinstatement offer terminates the period for which backpay is owed has its origin in the ancient principle of law that:

⁶² 103 NLRB 414 (1953), *enfd.*, 206 F.2d 557 (4th Cir. 1953).

⁶³ *Id.* at 419.

⁶⁴ 3 NLRB Casehandling Manual § 10612.1 (1977).

⁶⁵ *Id.* § 10530.1(1) (1977).

“Where one person has committed a tort, breach of contract, or other legal wrong against another, it is incumbent upon the latter to use such means as are reasonable under the circumstances to avoid or minimize the damages. The person wronged cannot recover for any item of damage which could thus have been avoided.” *Ford Motor Co. v. Equal Employment Opportunity Commission*, ___ U.S. ___ n.15, 73 L.Ed.2d 721, 732 n.15, 102 S.Ct. 3057, 3065 n.15 (1982), quoting C. McCormick, *Handbook on the Law of Damages* 127 (1935).

Thus, the general rule that refusal of a reinstatement offer ends liability for backpay rests on the belief that the injured worker should not be paid for losses “which he wilfully incurred.” *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 197-198 (1941); *Ford Motor Co. v. Equal Employment Opportunity Commission*, *supra*.

Applying this analysis here, the discriminatees should not be barred from recovering backpay simply because they were unable immediately to accept the employers’ reinstatement offer. The employees could not have avoided the damage because they were unable to accept the reinstatement offer precisely because of the nature of the employers’ unfair labor practice. The discriminatees did not “wilfully incur” any portion of their loss.

Allowing the Board to set a minimum period of backpay would not require the Board to engage in improper speculation. The Board has traditionally had the discretion to evaluate “what might have been” absent an unfair labor practice in order to fashion a remedy. *NLRB v. Superior Roofing Company*, 460 F.2d 1240, 1241 (9th Cir. 1972).

The Seventh Circuit determined here that an appropriate backpay period was six months, reasoning that, but for the employer’s unfair labor practice, the discriminatees would have continued to work in the United States for that period. Contrary to the assertions of Petitioners, the six-months estimate is not unreasonable. Studies of undocumented aliens

apprehended by the INS show that the majority have worked in the United States at least seven months prior to apprehension. INS statistics show that between 1976 and 1980, between 47.3 percent and 61.9 percent of undocumented aliens discovered by the INS Investigations Division have been in the United States more than seven months.⁶⁶ An earlier study indicated that the average time spent in the United States by apprehended undocumented aliens was 2.5 years and the median was over 4 years.⁶⁷

Thus, there is every reason to conclude that the discriminatees in this case would have been able to remain in the United States at least six more months but for the employer's unfair labor practice.

D. The Employer Should Be Required to Communicate With the Discriminatees in Both English and Spanish.

There is ample precedent for requiring that a notice related to an employer's unfair labor practice be posted both in English and in Spanish or another appropriate second language.⁶⁸ While prior cases have involved posted notices rather than reinstatement offers, there is no justification for requiring posted notices to be bilingual but allowing reinstatement offers to be written in English alone.

Petitioners' reliance on *General Iron Corp.*, 218 NLRB 770 (1975), is misplaced. In *General Iron Corp.*, the Board

⁶⁶David S. North, *Government Records: What They Tell Us About the Role of Illegal Immigrants in the Labor Market and in Income Transfer Programs* 21 (1981).

⁶⁷David S. North and Marion F. Houston, *The Characteristics and Role of Illegal Aliens in the U.S. Labor Market: An Exploratory Study* (1976).

⁶⁸*See, e.g., Apollo Tire Co., Inc.*, 236 NLRB 1627, n.3 (1978), *enfd.*, 604 F.2d 1180 (9th Cir. 1979); *Viracon, Inc.*, 256 NLRB 245 (1981); *John F. Cuneo*, 152 NLRB 929 (1965). The Board has also mandated the use of bilingual ballots in union representation elections where requested. *See, e.g., NLRB v. Lowell Corrugated Container Corp.*, 431 F.2d 1196 (1st Cir. 1970); *General Dynamics Corp.*, 187 NLRB 679 (1971).

held that a reinstatement offer written in English was satisfactory, despite the fact that all but one of the laid-off employees were Spanish speaking. This holding, which has been criticized by commentators as "logically indefensible," see Douglas S. McDowell and Kenneth C. Huhn, *NLRB Remedies for Unfair Labor Practices* 111 (1976), is in any event distinguishable. In *General Iron Corp.*, the Board appeared to reason that those who cannot speak English may yet read it and that a person who cannot read a letter may be able to show it to "a member of the family, often a child who is attending public school, a friend, or neighbor. . . . People do not just ignore or throw away letters written in English, especially where, as here, they come from an employer who has just laid them off." 218 NLRB at 771. That rationale, however, is not applicable to aliens who find themselves returned to their native land, surrounded by others who cannot read English.⁶⁹

CONCLUSION.

For the foregoing reasons, *amici curiae* respectfully request that this Honorable Court affirm the judgment of the Court of Appeals.

Respectfully submitted,
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⁶⁹Many aliens come from rural areas or small villages in the central plateau of Mexico. W.A. Cornelis, L.R. Chavez, and J.G. Castro, *Mexican Immigrants and Southern California: A Summary of Current Knowledge* 17-20 (1982).

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ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States
OCTOBER TERM, 1982

No. 82-945

SURE-TAN, INC., AND SURAK LEATHER COMPANY,
Petitioners

versus

NATIONAL LABOR RELATIONS BOARD,
Respondent.

**ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SEVENTH CIRCUIT**

**MOTION TO FILE AMICUS CURIAE BRIEF
AND AMICUS CURIAE BRIEF
IN SUPPORT OF RESPONDENT**

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**MOTION FOR LEAVE TO FILE
AMICUS CURIAE BRIEF**

Comes now the United Farm Workers of America, AFL-CIO, by its attorneys Dianna Lyons, Carlos M. Alcala, Federico G. Chavez, Ellen J. Eggers, Daniel A. Garcia, Ira L. Gottlieb and Wendy Sones, and petitions this honorable Court to grant it leave to file an amicus curiae brief in support of respondent's position. This motion is based upon this notice, and the declaration of Carlos M. Alcala.

The amicus brief proposed to be filed accompanies this motion, pursuant to Supreme Court Rule 36.3.

DATED:

7-20-83

Respectfully submitted,

Carlos M. Alcala

CARLOS M. ALCALA

**DECLARATION OF CARLOS M. ALCALA
IN SUPPORT OF MOTION TO FILE
AMICUS CURIAE BRIEF**

1. I am an attorney admitted to practice before the Supreme Court of the State of California, and am a member of the Bar of the Supreme Court of the United States.

2. I represent the United Farm Workers of America, AFL-CIO ("UFW") in this matter, as do Dianna Lyons, Federico G. Chavez, Ellen J. Eggers, Daniel A. Garcia, Ira L. Gottlieb and Wendy Sones.

3. The UFW is a labor organization representing agricultural employees in the United States, including California, Florida and Arizona. Its headquarters is located in Keene, California. It represents approximately 100,000 farmworkers at various times of the year. A substantial proportion of such laborers, who work in the southwestern farm regions of California and Arizona, are undocumented workers from Mexico, Latin America and the Philippines.

4. The National Labor Relations Act ("NLRA") expressly excludes agricultural employees from its coverage. However, the legislatures of the states of California and Arizona have enacted agricultural labor relations laws adopting administrative procedures closely modelled upon the NLRA structure. This Court's decision in the case at bar will therefore strongly influence the decisions of tribunals in those two states, which are certain to be confronted with similar issues regarding undocumented workers in the foreseeable future.¹ California Labor Code §1148 declares

¹ In fact, there is now a case pending before the California Agricultural Labor Relations Board, *Rigi Agricultural Services*, 81-CE-167-SAL, in which the Board will address the issue of state labor law protection for undocumented workers.

that "applicable precedents" under the NLRA are to be followed by the state's agricultural labor board and courts.

5. In its *amicus curiae* brief, the UFW will argue for affirmation of the decision of the court below. The UFW wishes to emphasize for the Court the profound impact this decision will have upon labor relations in the United States, given the substantial numbers of undocumented workers now present and continuing to arrive in the country. Growers in the southwestern United States rely heavily on such workers in order to successfully harvest their crops. The unalterable reality of the magnitude of the illegal alien population in the United States, and the public policy repudiating conduct such as that engaged in by petitioners in this case, requires that NLRA protection be extended to such workers. The UFW respectfully seeks to call the Court's attention to the plight of the huge yet legally invisible population toiling in this country without the basic protections most American workers take for granted.

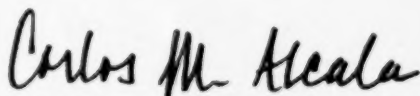
Extension of NLRA protection to undocumented workers benefits the public at large, and all workers in the United States. Today's undocumented workers are tomorrow's legal residents. This perspective should be considered by the Court in deciding this case.

6. Counsel for the UFW, Ira L. Gottlieb, has communicated by phone and letter with counsel for the petitioners, John A. McDonald of Keck, Mahin & Cate, and with the office of the Solicitor General, representing the Respondent. The Office of the Solicitor General replied by letter consenting to the UFW's petition. Counsel for petitioners has advised the UFW by letter that it opposes this *amicus* petition.

7. Upon the foregoing, the UFW respectfully requests this Court to GRANT its motion to file the attached amicus curiae brief, and consider said brief in making its decision in this case.

I declare under penalty of perjury that the foregoing is true and correct.

Respectfully submitted,

A handwritten signature in black ink, reading "Carlos M. Alcala". The signature is written in a cursive, flowing style with a large initial "C".

CARLOS M. ALCALA
Counsel of Record

IN THE
Supreme Court of the United States
OCTOBER TERM, 1982

No. 82-945

SURE-TAN, INC., AND SURAK LEATHER COMPANY,
Petitioners
versus
NATIONAL LABOR RELATIONS BOARD,
Respondent.

**ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SEVENTH CIRCUIT**

**AMICUS CURIAE BRIEF
IN SUPPORT OF RESPONDENT**

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QUESTIONS PRESENTED

1. May an American employer freely commit unfair labor practices against its employees working in the United States, if those employees are undocumented workers?

2. May the Court of Appeals make an appropriate order to effect a complete remedy for undocumented workers harmed by an employer's unfair labor practices, where such order is in harmony with the Immigration and Nationality Act?

SUMMARY OF ARGUMENT

Undocumented workers are present in the United States in large and ever-increasing numbers. Many are employed in occupations which few native-born or naturalized citizens would find attractive. In the cities, there are the reconstituted garment-manufacturing sweatshops; and in rural areas, there are the agricultural sweatshops of farms and nurseries. The workers are often paid sub-minimum wages, and are subject to substandard working conditions. They are afraid to complain, since they are faced with the constant threat of deportation of themselves, their families and their relatives.

Employer exploitation of the undocumented workers' status is at the root of the problem presented in this case. That exploitation not only adversely affects the threatened worker, it forces American citizens to accept lower standards. If a proven labor law violator may be excused its transgressions because its victims are illegal aliens, such an employer will continue to seek out such employees, and will thereby free itself of its legal obligations toward its workers. There is unquestionably a substantial pool of undocumented labor present in this country; employers will eagerly tap that pool if by so doing they are licensed to abandon their duties under the laws regulating workers' organizational rights, minimum wage standards and health and safety conditions in the workplace. If the public policy behind the adoption of such laws is to be preserved, then employers must comply with those laws without regard to the alienage status of their employees.

The immigration laws were adopted to protect American workers from incursions into American job markets by foreign workers. Nothing in the position of petitioners

tends to support that policy. Petitioners' view of the law, if legitimated by this Court, would only enhance management's power at the expense of both American and foreign workers.

In the industries and enterprises where there are dominant populations of undocumented workers, a reversal of the Court of Appeals decision in this case means nothing less than judicial approval of substandard working conditions, and a return to the chaotic state of labor relations extant prior to the enactment of the NLRA.

ARGUMENT

I

THE MASSIVE, UNCHECKED INFLUX OF UNDOCUMENTED WORKERS INTO THE UNITED STATES HAS MADE SUCH WORKERS AN INTEGRAL PART OF THE AMERICAN LABOR FORCE, ENTITLED TO THE BASIC WORKPLACE RIGHTS ENJOYED BY NATIVE-BORN AND NATURALIZED CITIZENS AND RESIDENT ALIENS

Sheer incapability or lax enforcement of the laws barring entry into this country, coupled with the failure to establish an effective bar to the employment of undocumented aliens, has resulted in the creation of a substantial "shadow population" of illegal migrants—numbering in the millions—within our borders. This situation raises the specter of a permanent caste of undocumented resident aliens, encouraged by some to remain here as a source of cheap labor, but nevertheless denied the benefits that our society makes available to citizens and lawful residents. The existence of such an underclass presents most difficult problems for a Nation that prides itself on adherence to principles of equality under law.

Plyler v. Doe, ____ U.S. ____, ____, 102 S.Ct. 2382, 2396 (1982)

- A. The Fact Of The Existence Of The Employer-Employee Relationship When The Employer Is Located And Does Substantial Business In The United States, Is Sufficient To Subject That Relation And That Employer To NLRB Adjudicative And Remedial Jurisdiction

The case at bar presents a poignant example of the difficult contemporary problems faced by this Nation of immigrants in confronting the reality of a substantial population of undocumented workers. As noted in *Plyer v. Doe*, *supra*, such workers are "subject to the full range of obligations imposed" by a State's civil and criminal laws, by virtue of their presence within that State, 102 S.Ct. at 2394. The same can be said of the applicability of federally-imposed obligations to persons who enter upon American soil.

In enacting the National Labor Relations Act, Congress sought to do more than protect workers' individual rights. The NLRA was enacted to promote, through protection of employees' organizational rights, and sanctioning of the collective bargaining process,

the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employee . 29 U.S.C. §151.

Congress declared that the purpose of the NLRA—to remove obstructions to the free flow of interstate commerce—would be accomplished by

encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection. *Id.*

Inherent in this policy pronouncement, and in the enforcement scheme that follows (29 U.S.C. §§151, *et seq.*), is the Congressional desire to regulate not just the conduct of individual employers and employees, but the *relation between* employer and employees. It is the manner in which that relation is fashioned that determines the degree of success achieved by the NLRB in reaching the goals expressed in §151. And it is that relation which the NLRB and Court of Appeals properly sought to regulate in the case at bar.

Regardless of the undocumented status of the discharged workers, they had entered into an employment relationship with the petitioners (who accepted them without objection until the union was victorious), an American corporation doing substantial business in and located within the United States. These undisputed facts suffice to confer adjudicative and remedial jurisdiction upon the NLRB.¹

¹ These facts also serve to distinguish this case from those decided by this Court involving disputes between American unions and foreign maritime shipowners employing foreign crews, cited in *Windward Shipping Ltd., v. American Radio Ass'n.*, 415 U.S. 104, 109, fn. 10, 94 S.Ct. 959, 962 (1974).

In those cases, the Court objected to the potential insinuation of NLRB jurisdiction into essentially non-American labor relations, and found the maritime operations before it not to be within the stream of commerce regulated by the Act. Neither objection is applicable here. In any case involving foreign employers and American employees, this Court held that the Board could assert jurisdiction, *International Longshoremen's Local 1416 v. Ariadne Shipping Co.*, 397 U.S. 195, 200, 90 S.Ct. 872, 874 (1970).

B. Denial Of NLRA Protection To Workers Because Of Their Undocumented Status Violates The Fifth Amendment

This Court has ruled that workers have no Constitutional right to compel their employers to bargain collectively, though they are guaranteed the right to voice their views to the employer collectively, *Babbitt v. United Farm Workers*, 442 U.S. 289, 312-13, 99 S.Ct. 2301, 2316 (1979). However, it is a longstanding principle, implicitly recognized in *Babbitt* (see 442 U.S. 289, 313 fn. 19, 99 S.Ct. 2316), that if and when the government chooses to confer benefits, it may not discriminate among the potential beneficiaries in an unconstitutional manner. See *Turner v. Fouche*, 396 U.S. 346, 90 S.Ct. 532 (1970), *Douglas v. California*, 372 U.S. 353, 83 S.Ct. 814 (1963), *Griffin v. Illinois*, 351 U.S. 12, 76 S.Ct. 585 (1956).²

With respect to government discrimination between aliens and citizens, this Court has formulated a special adaptation of the traditional two-tiered equal protection analysis. "Heightened" scrutiny is applied to classifications "primarily affecting economic interests," while "strict scrutiny is out of place" when the restriction against aliens is

within a State's constitutional prerogative [and] constitutional responsibility for the establishment and operation of its own government, as well as the qualifications of an appropriately designated class of public office holders (citation omitted).

² While the equal protection clause does not apply to the federal government, a similar doctrine of equal justice under law has developed under the Fifth Amendment. *Hampton v. Mow Sun Wong*, 426 U.S. 88, 100-101, 96 S.Ct. 1895, 1904 (1976).

Cabell v. Chavez-Salido, _____ U.S. _____, 102 S.Ct. 735, 739 (1982).³

For the workers and the employer involved in this case, the allocation of burden and benefit, respectively, of an exemption from the NLRA for undocumented workers would be primarily felt in economic terms. The employees could not require their employer to recognize and bargain collectively with a union. In practice, they could not wield any collective bargaining strength, nor make any demands upon their employer for better working conditions. Any such demand could be met, as happened here, by discharge, or other penalties or threats.⁴ The employer would have no reason to respect (let alone accomodate) employees' demands, knowing that the remedial power of the NLRB could not be brought to bear against it.

³ The *Cabell* majority, in footnote 1 of its opinion, reserved the question of Constitutional limits on state action directed at *illegal* aliens. For the purposes of cases such as the one at bar, the analysis ought to be the same since the purposes behind enactment of the remedial portions of the NLRA do not vary with the immigration status of workers employed by an American employer.

Similarly, this Court has stated that aliens are protected under Title VII of the Civil Rights Act, 42 U.S.C. §2000e *et seq.* *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 95, 94 S.Ct. 334, 340 (1973), based on the breadth of the definition of the potential discriminatee found in §703.

⁴ *Sure-Tan* argues that its actions in this case do not constitute a constructive discharge. This contention will be discussed *infra*, but the ultimate effect of petitioners' position is that where the facts of the discharge are clear, and the discharge is indisputably based upon motives unlawful under the NLRA, the discriminatees are still left without a remedy. (The company unsuccessfully contended, in an earlier case, *Sure-Tan v. NLRB*, 583 F.2d 355 (7th Cir. 1978), that undocumented workers could not vote in an NLRB election).

C. Protection Under The NLRA For Undocumented Workers Does Not Interfere With Federal Immigration Policy

What gives this case its unique character is the need for consideration and harmonization of federal labor and immigration policies. We have considered above the public policy of the NLRA that would be promoted by affording its protection to undocumented workers.³ In addition, providing such workers with the basic statutory guarantees of the Wagner Act is perfectly compatible with federal immigration policy.

Petitioners correctly assert that the immigration laws were passed to protect the jobs of American workers from competition from foreign immigrant workers. However, petitioners seek by their contentions not to protect the rights of its employees (after all, the removal of petitioners' employees occurred because of their support for a union, not because of their undocumented status—the laborers remained working after Surak discovered their status; he took action only after the union had triumphed), but to

³ One commentator has criticized the earlier *Sure-Tan* decision (see footnote 4, *supra*), contending that interpreting "employee" under the NLRA to include undocumented workers does not advance labor law policy, "Labor Law—Illegal Aliens Are Employees Under 29 U.S. C. §152(3) (1976) and May Vote in Union Certification Elections," 10 Rutgers-Cam. L.J. 747 (1979). As noted in the text of this brief, this is inaccurate. The commentator observes, for instance, at p. 753, that alien workers will not complain of labor law violations for fear of deportation. However, a union would have standing to complain, and remedies such as those ordered by the Court of Appeals should deter employers from exploiting the illegal alien status of its employees.

transform the INA into a management tool to void *all* employee rights under the NLRA in those places where illegal aliens work. There is no INA provision, and no hint of Congressional intent, that would support such a conclusion. The NLRA and INA were both enacted with the idea of protection of American employees' rights; petitioners' attempts to justify their actions in terms of INA policy is therefore a gross distortion, and disingenuous in light of the record.

It has been argued that the remedy provided by the Court of Appeals violates immigration policy because it encourages undocumented workers to return illegally to the United States. In the abstract, such an argument may appear logical. But if a worker presented himself for reinstatement and backpay, he or she would necessarily call attention to him or herself, inviting another deportation if the entry were illegal.

Furthermore, the numbers of undocumented workers attracted to this country by NLRB remedial orders would be minuscule compared to the numbers employers would recruit and hire in the hope of stripping their workforces of NLRA protection (as well as other Congressionally-mandated protection for workers). NLRB orders, issued case-by-case, affect single individuals or small groups if this court strips undocumented workers of Wagner Act protection, literally millions of workers presently in this country will suffer the consequences, while their employers reap the rewards. Employers would be motivated not only to hire undocumented workers, but to conceal them from immigration authorities.*

* This actually occurred in a California agricultural labor case, *Rigi Agricultural Services*, 81-CE-167-SAL.

This case does not present this Court with two alternatives, only one of which tends to interfere with immigration policy. Rather, the choice is between respondent's position, which at most may result in a marginal change in immigration patterns, and petitioners' position, which will encourage employers to seek out undocumented workers to establish a regulation-free environment at their workplaces. Petitioners practically ask this Court to mandate employer-created "enterprise zones" where the force of labor relations law, health and safety laws, and fair labor standards laws would be suspended because of the make-up of the workforce. With no compelling justification for doing so under the strict scrutiny standard (there being no conflict with federal immigration policy), such discrimination is unconstitutional, prohibited by the Due Process Clause of the Fifth Amendment.

II

AN EMPLOYER WITHIN THE JURISDICTION OF THE WAGNER ACT CANNOT USE THE IMMIGRATION LAWS TO DEPRIVE ITS WORKERS OF THAT ACT'S PROTECTION

A. The Employer's Action In This Case Constitutes A Constructive Discharge

The petitioners seek to portray their conduct as pristine, consisting of nothing more than that which any law-abiding company might do to stem the tide of illegal immigration into this country. A review of the factual findings of the NLRB's Administrative Law Judge ("ALJ"), at 234 NLRB 1188-1191, will dispel that notion.

In sum, the ALJ found that the company: a) threatened its employees with less work if they voted for the union, and promised more work if they did not support the union; b) unlawfully interrogated the employees about their union sympathies; c) threatened its employees with notification of the INS of their illegal status; d) threatened to close down the business if the employees supported the union; e) requested an INS investigation of its employees' immigration status shortly after the union was certified, with full knowledge of such employees' undocumented status and the consequences of such an investigation.

This is not a company moved to call upon the INS on the crest of a wave of public-spiritedness; nor was it threatened with penalties arising out of its employ of undocumented workers. Petitioners were confronted only with a duty to bargain with the certified representative of their employees; they chose instead to utilize the INS to carry out their anti-union policy. Sure-Tan was not concerned with its employees' immigration status until the advent of the union. The National Labor Relations Board had ample reason to find the employer's actions to constitute a constructive discharge.

Petitioners' argument with respect to the constructive discharge appears to amount to a denial of the fact that it discharged anyone; indeed, it seems to deny that a discharge occurred at all.

Blaming the INS for the discharge is a little like a gunman blaming his gun for a shooting death. Petitioners acted with full knowledge of the consequences of their acts. Their abusive⁷—and unlawful conduct throughout the union

⁷ One of the company's partners, John Surak, was found to have referred to the workers on several occasions as "son of a bitches", 234 NLRB at 1190.

campaign demonstrates petitioners' anti-union animus. The timing of John Surak's letter to the INS, a day after he was notified of the union's certification, clinches his conduct as violative of the NLRA, see e.g., *Rain-Ware*, 263 NLRB No. 8, 111 LRRM 1004 (July 30, 1982).

A discharge need not be directly instigated by the employer to be so defined. Petitioners concede that an employer may cause a discharge by creating intolerable conditions forcing an employee to resign. That the INS has an independent legal duty to perform its functions does not diminish petitioners' responsibility for setting events in motion; more than one actor can be said to have "proximately caused" a given result and bear legal responsibility therefor.

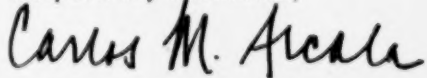
If the petitioners had directly discharged their employees their argument would remain the same. Either such workers are or are not entitled to protection under the NLRA. If they are, then inviting an intermediary to remove its employees will not shield the employer from the consequences of its unlawful acts. If undocumented workers are shorn of NLRA protection, the identity of the party who discharges the workers is immaterial.

CONCLUSION

This Court is confronted with the reality of the presence of millions of undocumented workers in this country. Many of them will eventually become legal residents. The intensity of the influx of such people will not be influenced by the Court's ruling in this case, but the basic standards and conditions under which all people live and work in America could well be significantly worsened if petitioners prevail.

This Court should therefore affirm the ruling of the court of appeals in all respects.

Respectfully submitted,

A handwritten signature in black ink, reading "Carlos M. Alcala". The signature is written in a cursive, flowing style with a large initial "C".

CARLOS M. ALCALA

DIANNA LYONS
FEDERICO G. CHAVEZ
ELLEN J. EGGERS
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CASE NAME: SURE-TAN v. NLRB

CASE NO.: 82-945

PROOF OF SERVICE BY MAIL

(C.C.P. 1013a and 2015.5)

I, the undersigned, say I am a citizen of the United States and work in the county of Kern, California, in which county the within-mentioned mailing took place. I am over the age of eighteen years and not a party to the subject case. My mailing address is Post Office Box 30, Keene, California, 93531.

On July , 1983, I served the within: ENTRY OF APPEARANCE on the parties in said action, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States post office box, at Keene, California addressed as follow:

Solicitor General
Department of Justice
Washington, DC 20530

Michael R. Flaherty
KECK, MAHIN & CATE
8300 Sears Tower
233 South Wacker Dr.
Chicago, ILL. 60606

I declare under penalty of perjury that the foregoing is true and correct. Executed on July , 1983, at Keene, California.

JULIA ARISIAGA

MOTION FILED
SEP 21 1982

IN THE

Supreme Court of the United States
OCTOBER TERM, 1982

No. 82-945

SURE-TAN, INC., AND SURAK LEATHER COMPANY,
Petitioners

versus

NATIONAL LABOR RELATIONS BOARD,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SEVENTH CIRCUIT

**MOTION TO FILE SUPPLEMENTAL
AMICUS CURIAE BRIEF AND
SUPPLEMENTAL AMICUS CURIAE BRIEF
IN SUPPORT OF RESPONDENT**

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**MOTION TO SUBMIT
SUPPLEMENTAL BRIEF**

COMES NOW, the United Farm Workers of America, AFL-CIO, and moves this honorable Court to grant it leave to file a supplemental amicus curiae brief, attached hereto. This motion is based upon this notice, the declaration of Carlos Alcala, and all documents on file in this case.

DATED: 9-20-83

Respectfully submitted,
Carlos M. Alcala
CARLOS M. ALCALA

DECLARATION OF CARLOS M. ALCALA

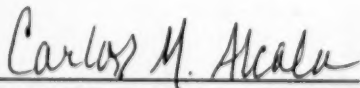
1. I am an attorney licensed to practice law before the Supreme Court of California, and am a member of the Bar of the Supreme Court of the United States.

2. I am counsel of record for the United Farm Workers of America, AFL-CIO ("UFW") who are represented also by Dianna Lyons, Federico Chavez, Ellen Eggers, Daniel Garcia, Ira Gottlieb (who prepared the brief previously submitted to this court, and the supplemental one attached hereto), and Wendy Sones.

3. On July 21, 1983, the UFW filed with this Court a motion to file an amicus curiae brief with an amicus curiae brief. The UFW therein explained the importance of this case to the union as an institution and to its membership.

4. The UFW seeks leave to file this supplemental amicus curiae brief because of the need for this Court to consider the First Amendment rights of the undocumented workers who were constructively discharged by Petitioner, in order to properly weigh the legality of Petitioner's conduct in this case.

I declare under penalty of perjury that the foregoing is true and correct and was executed on September 20, 1983 in Keene, California.


CARLOS M. ALCALA

QUESTION PRESENTED

Where an employer, whose sole intent is to infringe upon its workers' First Amendment rights to organize, choose a representative and air grievances, requests in effect that the government have such workers deported, is that communication privileged under the First Amendment where the request is not intended to influence a governmental policy decision?

SUMMARY OF ARGUMENT

For at least the entire second half of the twentieth century, it has been the law of the land that workers enjoy a First Amendment right to freedom of association at the workplace, encompassing the rights to organize, choose a representative and air grievances to their employer. Congress has provided statutory protection, and administrative procedures to ensure such protection, for the above rights and others through enactment of the National Labor Relations Act ("NLRA").

Petitioner deliberately sought to deprive its workers of such rights by requesting the Immigration and Naturalization Service ("INS") to "investigate" the immigration status of its employees; Sure-Tan knew full well that the workers, who had just voted to be represented by a union, were undocumented and subject to deportation. Petitioners' action constituted a constructive discharge.

Communication by private individuals to government entities—courts, administrative agencies, the executive branch, the legislature—has been held by this Court to be protected from antitrust sanction under the *Noerr-Pennington* doctrine. However, where such communication is aimed not at permissible persuasion, but at obstruction or manipulation of government process to deprive others of their First Amendment rights, this Court and the lower federal courts have declined to accord such conduct any privilege or immunity. The conduct this Court has previously condemned, and that of Petitioner here, are akin to common law abuse of process, in which a person may be liable for an abuse or malicious use of government process even where probable cause exists.

Consistent with this Court's decisions and policies expressed therein, the lower federal courts have distinguished for *Noerr-Pennington* purposes between communication to government intended to influence policymaking, discretionary decisions, and contacts intended to spur action of a

more ministerial or proprietary nature. They accordingly have found the former protected, and the latter unprotected. This is in keeping with the *Parker v. Brown* decision, 317 U.S. 341 (1943) as interpreted in *City of Lafayette v. La Power & Light Co.*, 435 U.S. 389 (1978), which grants antitrust immunity to a state in carrying out its sovereign (i.e., policymaking) functions, while permitting liability to attach where such functions are not involved.

Petitioners here have cynically manipulated the INS' resources to further their own anti-union ends. Petitioners had no intention of influencing INS policy, regulation or practice; they sought only to thwart their employees' right to organize, and collectively bargain, under the First Amendment, and the NRLA. Petitioners' communication to the INS was thus clearly a sham not worthy of protection as a petition for redress of grievances.

This Court's decision in *Bill Johnson's Restaurants, Inc., v. NLRB*, _____ U.S. _____, 103 S.Ct. 2161 (1983), does not aid Petitioners. The employer's conduct in the case at bar is not entitled to or deserving of the same high level of Constitutional protection as the right to file suit; Petitioners' conduct would have the tendency to chill the exercise of First Amendment rights by employees who remained in their employ, as well as destroying the rights of those discharged, without a legally cognizable countervailing interest of the employer having been served. If an employer may freely retaliate against its undocumented workers for exercising their Constitutional rights, it will be motivated to repeat such conduct in the future.¹

¹ See Note, "Retaliatory Reporting of Illegal Alien Employees: Remedying the Labor-Immigration Conflict", 80 Col.L.Rev. 1296 (1980) and Kutchins & Tweedy, "No Two Ways About It: Employer Sanctions Versus Labor Law Protections for Undocumented Workers," 5 Ind. Rel.L.J. 339, 350-62 (1983).

I

WORKERS' RIGHTS TO ORGANIZE, SELECT A BARGAINING REPRESENT- ATIVE, AND AIR GRIEVANCES ARE PROTECTED BY THE FIRST AMENDMENT

This Court and the lower federal courts have long recognized that the First Amendment protects employees who join together as a group, choose a representative, air grievances to their employers, and otherwise act jointly to promote and advance their common interests, *Thomas v. Collins*, 323 U.S. 516 (1945), *Brotherhood of Railroad Trainmen v. Virginia*, 377 U.S. 1 (1964) *Smith v. Ark State Hi'way Employees*, 441 U.S. 463, 465 (1979), *Hanover Township Federation v. Hanover Community School Corp.*, 457 F.2d 456 (7th Cir. 1972), *Elks Grove Firefighters v. Willis*, 400 F.Supp. 1097, 1099 (N.D. Ill. 1975). Of course, those categories of employees covered by the National Labor Relations Act, 29 U.S.C. §151 et. seq., (hereinafter referred to as "NLRA" or "Act") have thereby been afforded broader protection for the concerted workplace-related activities, and may turn to a federally-established agency, the National Labor Relations Board ("NRLB" or "Board") for relief from employer-instigated unfair labor practices.

While the blossom of labor-related exercise of First Amendment freedoms would appear to have withered somewhat under this Court's interpretation of the NRLA,² the rights referred to above remain at the unassailable core of the First Amendment, *Cf. NAACP v. Claiborne Hardware*, _____ U.S. _____, 102 S.Ct. 3409, 3423 (1982).

² See Note, "Peaceful Labor Picketing and the First Amendment," 82 Col. L. Rev. 1469 (1982).

When an employer discharges its employees in retaliation for their exercise of the right to associate, a Constitutional as well as a statutory interest is implicated. Consistent with this Court's decisions with respect to the right to petition the government for redress of grievances, this Court must weigh the employees' First Amendment rights when it considers Petitioners' argument that its communication to the INS merits the invocation of the Bill of Rights. This Court stated as much in *California Motor Transport v. Trucking Unlimited*, 404 U.S. 508 (1972), when it held that one party's exercise of its right of access to tribunals cannot result in the denial of that right to another party.

When the contentions of the parties now before this Court are juxtaposed in the light of applicable precedent, Sure-Tan's deportation signal simply does not rise to the same level of constitutional significance as even undocumented workers' right to band together in solidarity.

II

PETITIONER'S CONDUCT CONSTITUTED A SHAM NOT PROTECTED BY THE NOERR-PENNINGTON DOCTRINE

- A. The *Noerr-Pennington* Doctrine Was Established To Protect Only Conduct Intended To Influence Discretionary And/Or Policymaking Governmental Decisions

Petitioners draw on *Eastern Railroad Presidents Conference v. Noerr Motor Freight*, 365 U.S. 127 (1961), *California Motor Transport Co., v. Trucking Unlimited*, 404 U.S. 508 (1972) and *Bill Johnson's Restaurant v. NRLB*, _____ U.S. _____, 103 S.Ct. 2161 (1983), for an analogy to its conduct in the case at bar. The following analysis of those and related cases, establishing and apply-

ing the "*Noerr-Pennington* doctrine," demonstrates that the conduct engaged in by Petitioners is qualitatively different from the First Amendment "petitions" the courts have shielded from civil liability.

The *Noerr-Pennington* doctrine arose out of the antitrust context. In *Noerr, supra*, truck operators sued twenty-four railroads, charging that they had violated the anti-trust laws by hiring a consultant to conduct a publicity campaign against truckers designed to foster adoption of laws and "law enforcement practices" destructive of the trucking business. It was alleged that the railroads had succeeded, *inter alia*, in persuading the Governor of Pennsylvania to veto a bill that would have permitted truckers to carry heavier loads on Pennsylvania roads. The trial court found Sherman Act violations, and the Court of Appeals affirmed. The Supreme Court reversed, declaring that no violation of the Sherman Act could be predicated upon mere attempts to influence the passage or enforcement of laws. Its rationale was twofold: a) the government can only govern properly if people have unimpaired access to their representatives and operatives to make their wishes known, even where the person has a direct pecuniary interest in the decision(s) he/she is attempting to influence; and b) the right to petition for redress of grievances is protected by the First Amendment. The Court stated that conduct "otherwise lawful" could not be violative of the Sherman Act because of the railroads' established purpose to destroy competition. Finally, the Court noted that an exception may exist to the *Noerr* rule where

a publicity campaign, ostensibly directed toward influencing governmental action, is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor. . . 365 U.S. at 144.

Since the trial court had found the railroads' campaign "genuine," no Sherman Act violation was found.

In *United Mine Workers v. Pennington*, 381 U.S. 657, 85 S.Ct. 1585 (1965), the facts relevant to its applicability to Sure-Tan were that the union and certain mining employers approached the Tennessee Valley Authority in order to persuade it to curtail its spot market purchases, and the Secretary of Labor, in order to persuade him to establish minimum wages, all with the purpose of driving small mine operators out of business. Citing *Noerr*, the Court held it not unlawful to approach the government with an anti-competitive purpose.

The "sham" exception noted in *Noerr* was explicated by the Supreme Court in *California Motor Transport, supra*. In a Clayton Act suit by certain California carriers against others, it was alleged that the defendants had instituted state and federal proceedings to resist and defeat applications of plaintiffs to acquire or transfer operating rights. The district court dismissed the case, and the Court of Appeals reversed. The Supreme Court reiterated the *Noerr* rationale, and declared that the right to petition extends to administrative agencies, and all governmental departments. But the Court also noted that "First Amendment rights are not immunized from regulation when they are used as an integral part of conduct which violates a valid statute", 404 U.S. at 513-14, and that First Amendment rights may not be used as the means or the pretext for achieving "substantive evils" *Id.*, at 515 (citations omitted).

A combination of entrepreneurs intended to harass and deter competitors from having free and unlimited access to agencies and courts comes within *Noerr's* "sham" exception, and a Clayton Act cause of action was therefore stated. The Court stated that where the end result is unlawful, it does not matter that the means used to achieve that violation may have been lawful, *Id.* at 515.

Bill Johnson's Restaurants v. NLRB, supra, held that the

NRLB may not enjoin an employer's unpreempted, federally lawful state court suit against its employees when the suit is filed in retaliation for their use of NRLB processes, unless the suit lacks merit. "Lack of merit" signifies a suit subject to dismissal or summary judgment, or one lost or withdrawn by the plaintiff. Filing of an unmeritorious lawsuit may constitute an unfair labor practice. The Court found that while the employees had a substantial interest in Board intervention, 103 S.Ct. at 2168-69, the employer's First Amendment "right to petition" the courts outweighed their interest where the state suit had a reasonable basis.

Bill Johnson's represents this Court's view of the *Noerr-Pennington* doctrine analogously applied to a labor relations context; if the suit is retaliatory and lacks merit, it is a "sham" not worthy of First Amendment protection. If the suit has a reasonable basis, the litigation may proceed.

The *Noerr-Pennington* doctrine has been applied in federal courts in a number of contexts, see *Bradley v. Computer Sciences Corp.*, 643 F.2d 1029 (4th Cir. 1981) *cert. den.* 102 S.Ct. 476 (defendant's letter to plaintiff-government employee's superiors complaining of plaintiff's performance is privileged under First Amendment); *Stern v. U.S. Gypsum*, 547 F.2d 1329 (7th Cir.) *cert. den.*, 434 U.S. 975 (1977) (complaint similar to that in *Bradley*); *Gorman Towers v. Bogoslavsky*, 626 F.2d 607, 614-15 (8th Cir. 1980) (private citizens may lobby for unconstitutional zoning ordinance) (the *Gorman* Court lists several other cases on subject); *WIXT Television v. Meredith Corp.*, 506 F.Supp. 1003, 1025-35 (N.D.N.Y. 1980); (asserted denial of access to regulatory agencies; alleged actions did not amount to a "sham").

The cases finding communications protected under *Noerr-Pennington* and the First Amendment have the common ingredient of an appeal to a government official's discretion, independent judgment, and/or policymaking

power. That common element squares well with both *Noerr* rationales.³

Where the communicator is seeking a change in a government policy, making a complaint about the conduct of a government employee, or presenting a problem to a legislator or judicial body, a more or less formal system of advocacy is established, and the decisionmaker retains his/her discretion (guided by appropriate law) over the outcome, see *City of Kirkwood v. Union Electric Co.*, 671 F.2d 1173, 1180-81 (8th Cir. 1982). As Petitioner admits in its brief (p. 14), no discretionary decision of this nature was required of, or made by INS. Nor was the Petitioner seeking a change in regulations, law, or law enforcement practice. Petitioner, without citation, argues that its conduct rises to the level of dignity for First Amendment purposes of the filing of a lawsuit (p. 18). But several federal courts have found that the *Noerr-Pennington* doctrine was intended to protect only those communications related to decisions of a policy-making nature, *Mid-Texas Communications v. A.T. & T.*, 615 F.2d 1372, 1382 (5th Cir. 1980) ("The doctrine has been applied only to situations involving direct actions made to influence governmental decision-making"); *Woods Exploration Co., v. Aluminum Co., of America*, 438 F.2d 1286, 1296-97 (5th Cir. 1971), *George R. Whitten v. Paddock Pool Builders*, 424 F.2d 25 (1st Cir. 1970).

In *Whitten*, a manufacturer of prefabricated pool gutters was accused of conspiring to require the use of its own specifications in the public swimming pool industry, with the intent to exclude all others. In response to the manufacturer's arguments that it cannot be found liable under *Noerr-Pennington* for its attempts to influence the government, the Court stated that

³ It is in the political, legislative or litigative spheres where the government, to govern properly, must rely on information and resources outside of its immediate grasp. And it is political, legislative and litigative "speech" that is protected by the First Amendment. *In Re Airport Antitrust Litigation*, 474 F.Supp. 1072, 1079-92 (N.D. Ca. 1979), "Application of the Sherman Act to Attempts to Influence Government Action," 81 Harv. L. Rev. 847 (1968).

[t]he key to [the *Noerr*] decision, in our opinion, is the Court's heavy emphasis on the political nature of the railroad's activities and its repeated reference to the "passage or enforcement of laws." The entire thrust of *Noerr* is aimed at insuring uninhibited access to government policy makers. A pluralistic society moves by many motives. The hope, supported by history, is that permitting every interest to be heard will produce a tolerable amalgam responsive to the needs of a given time. But the efforts of an industry leader to impose his product specifications by guile, falsity, and threats on a harried architect hired by a local school board hardly rise to the dignity of an effort to influence the passage or enforcement of laws. *By "enforcement of laws" we understand some significant policy determination in the application of a statute, not a technical decision about the best kind of weld to use in a swimming pool gutter, 424 F.2d at 32. (emphasis added)*

This interpretation of the reach of the *Noerr-Pennington* doctrine is congruent with this Court's "sovereign immunity" rulings in the antitrust arena, *Parker v. Brown*, 317 U.S. 341 (1943) and *City of Lafayette v. La Power & Light Co.*, 435 U.S. 389 (1978). *City of Lafayette* held that since a state cannot be liable under the antitrust laws where it has deliberately established an anti-competitive policy, neither can a municipality be liable for carrying out such a policy. However, where the municipality acts in a proprietary capacity, as another competitor in the marketplace, it is not immune from antitrust attack.

The sovereign-proprietary distinction supports the parallel distinction made above. *Noerr* noted that lawful results could not be made unlawful because of an anti-competitive purpose. The only reason the results are lawful in many of the cases is because of government involvement in the action, or the state's imprimatur on the results. (It will be recalled that *Trucking Unlimited* declared that lawful means will not excuse unlawful results). If govern-

ment involvement is the immunizing element, then that involvement ought to be the product of independent judgment of government officials. A judge will not implicate him or herself as an antitrust conspirator simply by presiding over a baseless action, or series of actions;⁴ yet under *Trucking Unlimited*, the proponent, solicitor or financier of such actions may properly be liable, *Landmarks Holding Corp., v. Bermant*, 664 F.2d 891 (2d Cir. 1981).

As noted above, Petitioners did not seek to have any INS agent exercise his/her discretion. While the INS itself did nothing unlawful, their participation in the constructive discharge at Sure-Tan's behest cannot shield Sure-Tan from responsibility for the unfair labor practice that resulted.

B. Petitioner's Attempt To Manipulate The INS To Carry Out Its Unconstitutional Purpose Was A Sham, Akin To An Abuse of Process

The manipulation of a legal process for an ulterior motive not directly related to the ostensible purpose of that process is a common law abuse of process, 72 C.J.S. §120. Sure-Tan has engaged in an analogous abuse here.⁵ It set in motion the deportation of its employees for a purpose unrelated to the offense committed by the undocumented workers: it sought to rid itself of a union and discourage its employees from exercising the rights guaranteed them by the Constitution and the NLRA. Sure-Tan's purpose here was not merely *unrelated* to the triggering of INS' "investi-

⁴ It should be noted that it has been held that a multiplicity of baseless actions is not necessarily to come within the sham exception, *Clipper Express v. Rocky Mtn. Tariff*, 674 F.2d 1252, amended 690 F.2d 1240 (9th Cir. 1982).

⁵ *Bill Johnson's* was implicitly founded on the malicious prosecution doctrine, which is distinct from abuse of process. Malicious prosecution requires a lack of probable cause to bring the underlying action, and the commencement of the malicious prosecution suit can only come at the termination of the underlying case. An abuse of process suit does not depend on lack of probable cause; its gravamen is the ulterior motive unrelated to the purpose for the process.

gative" procedures, it was patently unlawful. While *Noerr-Pennington* protects an unlawful purpose resulting in lawful ends, neither *Noerr-Pennington* nor the analogous commonlaw doctrine of abuse of process in Illinois tolerates an unlawful purpose resulting in an unlawful result,⁶ see *Barrett v. Baylor*, 457 F.2d 119, 122-23 (7th Cir. 1972).

⁶ See Note, "Limiting the Antitrust Immunity for Concerted Attempts to Influence Courts and Adjudicatory Agencies: Analogies to Malicious Prosecution and Abuse of Process," 86 Harv. L. Rev. 715 (1973).

CONCLUSION

The First Amendment was intended to promote the free flow of ideas; untrammelled information distribution should lead to a more responsive government and a more responsible public. The individual components of the First Amendment—free press, free expression, free association, freedom to petition—are all intended to serve these great goals. When they come into conflict, it stands to reason that the interest closest to the core of First Amendment values must prevail.

In a contest between employees associating to inform and advise each other, with the purpose of mutual protection and airing of grievances, and an employer unlawfully calling upon the government to prevent such association, it is clear that the employees have a stronger Constitutional claim. Accordingly, the Court of Appeals decision below must be **AFFIRMED**.

DATED: 9-20-83

Respectfully submitted,

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(on the initial and supplemental briefs)

WENDY SONES

No. 82-945-CFX
Status: GRANTED

Title: Sure-Tan, Inc. and Surak Leather Company,
Petitioners
v.
National Labor Relations Board

Docketed:
December 6, 1982

Court: United States Court of Appeals
for the Seventh Circuit

Counsel for petitioner: Flaherty, Michael R.

Counsel for respondent: Solicitor General

Entry	Date	Note	Proceedings and Orders
1	Sep 15 1982		Application for extension of time to file petition and order granting same until December 6, 1982 (Stevens, September 17, 1982).
2	Dec 6 1982	G	Petition for writ of certiorari filed.
4	Jan 5 1983		Order extending time to file response to petition until February 9, 1983.
5	Feb 16 1983		DISTRIIBUTED. March 4, 1983
6	Feb 16 1983		Brief of respondent NLRB in opposition filed.
7	Feb 28 1983		DISTRIBUTED. March 4, 1983
8	Mar 7 1983		Petition GRANTED. *****
10	Apr 1 1983		Order extending time to file brief of petitioner on the merits until May 21, 1983.
13	Apr 29 1983		Order further extending time to file brief of petitioner on the merits until June 20, 1983.
14	Apr 29 1983	D	Motion of petitioners to proceed further herein in forma pauperis filed.
15	May 2 1983	G	Motion of petitioners to dispense with printing the joint appendix filed.
16	May 4 1983		DISTRIBUTED. May 19, 1983. (Above motions.)
17	May 23 1983		Motion of petitioners to proceed further herein in forma pauperis DENIED.
18	May 23 1983		Motion of petitioners to dispense with printing the joint appendix GRANTED.
19	Jun 22 1983		Brief of petitioner Sure-Tan, Inc., et al. filed.
22	Jul 18 1983		Order extending time to file brief of respondent on the merits until August 22, 1983.
23	Jul 21 1983	G	Motion of United Farm Workers of America, AFL-CIO, for leave to file a brief as amicus curiae filed.
24	Aug 15 1983	G	Motion of California Agricultural Labor Relations Board for leave to file a brief as amicus curiae filed.
25	Aug 15 1983		Record filed.
26	Aug 15 1983		Certified C.A. proceedings received.
27	Aug 22 1983		Order further extending time to file brief of respondent on the merits until September 21, 1983.
28	Aug 22 1983	G	Motion of Asian American Legal Defense and Educational Fund, et al. for leave to file a brief as amici curiae filed.
29	Aug 26 1983		Record filed.

Entry	Date	Note	Proceedings and Orders
30	Aug 26 1983		Certified original proceedings of NLRB received. (3 vols.)
32	Sep 8 1983		Motion of California Agricultural Labor Relations Board for leave to file a brief as amicus curiae GRANTED.
33	Sep 8 1983		Motion of United Farm Workers of America, AFL-CIO, for leave to file a brief as amicus curiae GRANTED.
34	Sep 21 1983	D	Motion of United Farm Workers of America, AFL-CIO, for leave to to file a supplemental brief as amicus curiae filed.
35	Sep 21 1983	G	Motion of American Federation of Labor and Congress of Industrial Organizations for leave to file a brief as amicus curiae filed.
36	Sep 23 1983	G	Motion of California Rural Legal Assistance Foundation for leave to file a brief as amicus curiae filed.
37	Sep 21 1983		Brief of respondent NLRB filed.
40	Oct 3 1983		Motion of Asian American Legal Defense and Educational Fund, et al. for leave to file a brief as amici curiae GRANTED.
41	Sep 23 1983	G	Motion of Mexican American Legal Defense and Educational Fund, Inc., et al. for leave to file a brief as amici curiae filed.
42	Oct 11 1983		Motion of United Farm Workers of America, AFL-CIO, for leave to to file a supplemental brief as amicus curiae DENIED.
43	Oct 11 1983		Motion of American Federation of Labor and Congress of Industrial Organizations for leave to file a brief as amicus curiae GRANTED.
44	Oct 11 1983		Motion of California Rural Legal Assistance Foundation for leave to file a brief as amicus curiae GRANTED.
45	Oct 17 1983		Motion of Mexican American Legal Defense and Educational Fund, Inc., et al. for leave to file a brief as amici curiae GRANTED.
46	Oct 14 1983		CIRCULATED.
47	Oct 24 1983		SET FOR ARGUMENT. Tuesday, December 6, 1983. (4th case) (1 hour)
48	Nov 29 1983	X	Reply brief of petitioners Sure-Tan, Inc., et al. filed.
49	Dec 6 1983		ARGUED.